CLERK'S COPY 23492

55

1105
T.C.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 196.

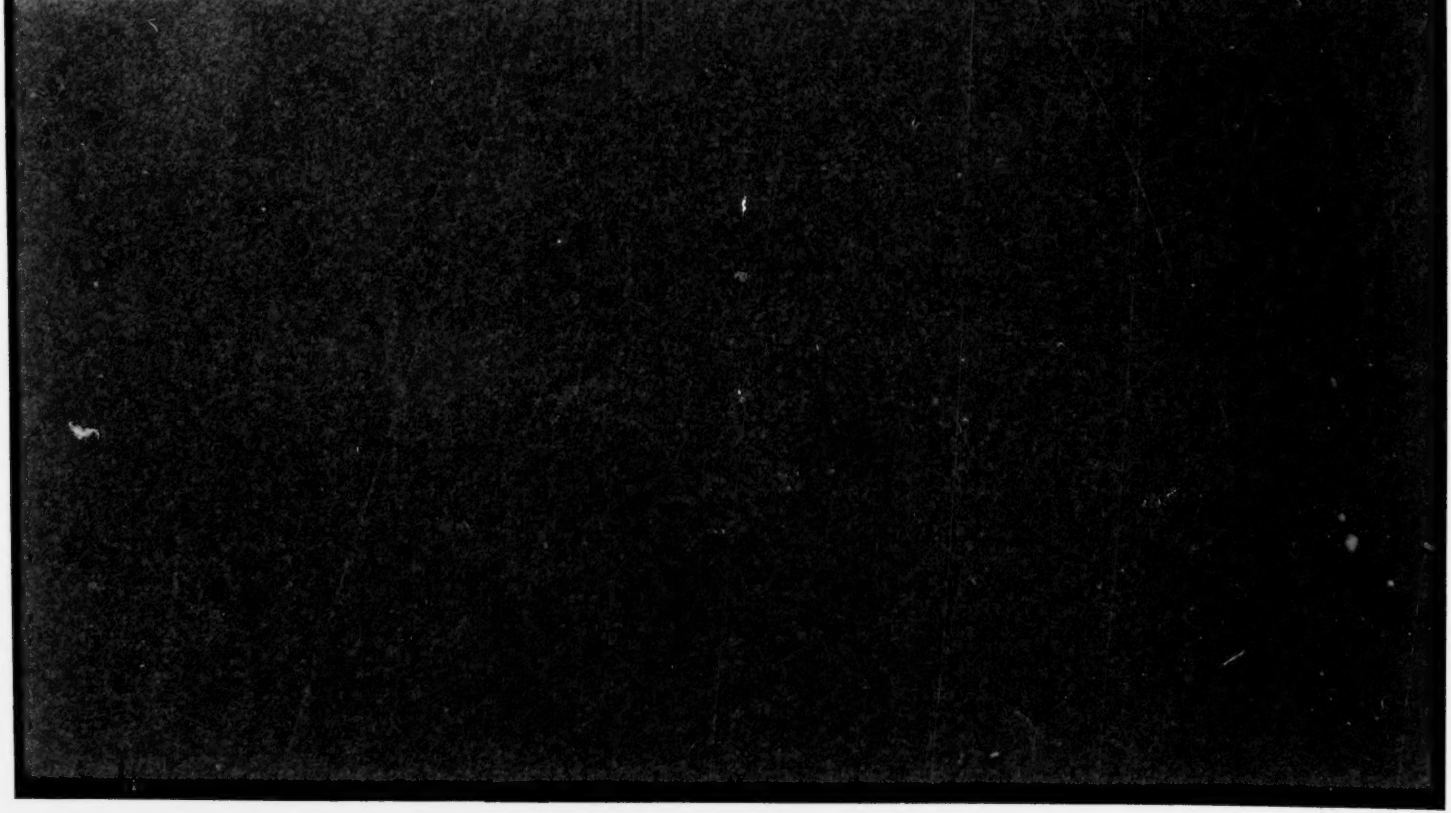
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE MISSION ROCK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED SEPTEMBER 26, 1903.
(23492.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 198.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE MISSION ROCK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the northern district of California	1	1
Complaint	1	1
Summons	4	2
Marshal's return	5	3
Answer	6	3
Stipulation waiving jury	9	4
Stipulation to substitute Mission Rock Company as defendant	10	5
Order substituting Mission Rock Company as defendant	11	5
Amended and supplemental complaint	12	6
Answer to amended and supplemental complaint	17	8
Findings of fact	20	10
Conclusions of law	26	13
Stipulation for supplemental finding	26	13
Supplemental finding	27	13
Judgment	28	14
Certificate to judgment roll	31	15
Opinion	32	15
Bill of exceptions	37	17
Exception to judgment	37	17
Judge's certificate to bill of exceptions	38	18
Agreement as to bill of exceptions	38	18

27763—02——0

	Original.	Print.
Transcript from the circuit court of the United States for the northern district of California—Continued.		
Petition for writ of error	38	18
Order allowing writ of error	40	18
Assignment of errors	40	18
Order staying proceedings	44	20
Supersedeas bond	45	20
Clerk's certificate to record	50	23
Writ of error	51	23
Return on writ of error	53	24
Citation and service	54	25
Opinion	56	25
Judgment	72	33
Petition for writ of error	73	34
Order allowing writ of error	74	34
Assignment of errors	75	35
Clerk's certificate	86	41
Writ of error	87	41
Return to writ of error	88	42
Citation	89	42
Proof of service of citation	90	42

No. 682.

In the United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY (A CORPORATION), plaintiff in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

TRANSCRIPT OF RECORD.

In error to the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California.

1 In the circuit court of the United States, ninth circuit, northern district of California.

AT LAW.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CALIFORNIA DRY DOCK COMPANY (A corporation), defendant.

Complaint in ejectment.

Now comes the said plaintiff, the United States of America, and complains of the said defendant, and for cause of action alleges:

I.

That the defendant, The California Dry Dock Company, has, at all the times in this complaint mentioned, been, and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State and northern district of California.

II.

2 That heretofore, to wit, on the 2d day of January, 1870, the said plaintiff was, and for a long time previous thereto had been, and continuously since has been, and now is, the owner and seised in fee, and entitled to the possession, of all that certain tract of land situate in the State and northern district of California, and described as follows, to wit:

Commencing at a point in the bay of San Francisco, State and northern district of California, distant 3,570 feet southeasterly from the southerly corner of Brannan and Second streets, said distance being measured along the extension, southeasterly of the southwesterly line of Second street; thence in a southwesterly direction at right angles with said line of Second street extended, 500 feet; thence at right angles southeasterly 800 feet; thence at right angles northeasterly 800 feet; thence at right angles northwesterly 800 feet; thence at right angles southwesterly 300 feet to the point of commencement.

Said tract of land being a square including the rock known as Mission

Rock, and containing 14.69-100 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian.

III.

That afterward, to wit, on the 1st day of May, 1878, and while the plaintiff was the owner of and entitled to the possession of said tract of land as aforesaid, the said defendant wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff there-
3 from and from the whole thereof, and from thence to the present time has wrongfully and unlawfully withheld, and now wrongfully and unlawfully withholds possession of said premises from the plaintiff to its damage in the sum of two hundred and fifty thousand ($250,000) dollars.

IV.

That the plaintiff is informed and believes, and upon such information and belief so avers, that the value of the rents, issues, and profits of said tract of land, ever since the said wrongful and unlawful entry of the defendant thereon, has been, and now is, the sum of five thousand ($5,000) dollars per annum.

Wherefore, the said plaintiff prays for judgment against the said defendant for the possession of all of the said tract of land aforesaid, and for the sum of two hundred and fifty thousand ($250,000) dollars, for the damages aforesaid, and for one hundred and five thousand ($105,000) dollars for the value of the rents, issues, and profits aforesaid, and for costs of suit.

FRANK L. COOMBS,
United States Attorney, Attorney for Plaintiff.
MARSHALL B. WOODWORTH,
Assistant United States Attorney, of Counsel.

(Endorsed:) Filed September 21, 1899. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

4 UNITED STATES OF AMERICA.

Circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CALIFORNIA DRY DOCK COMPANY (A CORPORATION), defendant.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

Summons.

The President of the United States of America, greeting, to the California Dry Dock Company (a corporation), defendant.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the circuit court of the

United States, ninth circuit, in and for the northern district of California, within ten days after the service on you of this summons, if
5 served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the court for any other relief demanded in the complaint.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of September, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the one hundred and twenty-fourth.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By W. B. BEAIZLEY, *Deputy Clerk*.

(Endorsed:) United States marshal's office, northern district of California. I hereby return that I received the within writ on the 21st day of September, 1899, and personally served the same on the 22d day of September, 1899, upon The California Dry Dock Company (a corporation), by delivering to and leaving with John Meyer, president of said The California Dry Dock Company (a corporation), said defend-
6 ant named therein, personally, at the city and county of San Francisco, in said district, an attested copy thereof, together with a copy of the complaint certified to by the United States attorney attached thereto.

San Francisco, September 22d, 1899.

JOHN H. SHINE,
United States Marshal,
By S. P. MONCKTON,
Office Deputy.

Filed September 22d, 1899. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the circuit court of the United States for the ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
v.
THE CALIFORNIA DRY DOCK COMPANY, DEFENDANT.

Answer.

Now comes The California Dry Dock Company, defendant in the above-entitled cause, and answering unto the complaint of the plaintiff therein avers as follows:

I.

It admits that the defendant is and has been a corporation as averred in said complaint.

7 II.

It denies that on the second day of January, 1870, the plaintiff was, or for a long time previous thereto had been, or continuously since or at any

time since has been or now is the owner or seised in fee, or entitled to the possession of all or any part of the land described in the complaint.

III.

It denies that on the first day of May, 1878, or at any time, while the plaintiff was the owner or entitled to the possession of the said land or otherwise, it wrongfully or unlawfully entered in or upon the same, or ousted or ejected the plaintiff therefrom or the whole or any part thereof, or that from thence to the present time, or that at any time, it has wrongfully or unlawfully withheld, or that it now wrongfully or unlawfully withholds, possession of said premises, or any part thereof, from the plaintiff, to its damage in the sum of two hundred and fifty thousand dollars, or any sum whatsoever.

The defendant further answering avers that it, the defendant, has been since the first day of May, 1878, and now is seised and the owner in fee of the said premises and in the lawful possession thereof, and that no other person or corporation is the owner thereof, and that the plaintiff was not at the time alleged in the complaint, or at any time since said date, and is not now, the owner, or entitled to the possession of the said premises, or any part thereof.

8 IV.

It denies that the value of the rents, issues, and profits of the said lands have been or are the sum of five thousand dollars per annum or any sum. And it further denies that it at any time entered unlawfully upon the said land.

Wherefore, the defendant prays judgment that the complaint be dismissed.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

I hereby certify that in my opinion the foregoing answer is well founded in point of law.

CHAS. PAGE,
One of the Counsel for Defendant.

(Endorsed:) Service of a copy of the within answer is hereby admitted this 3d day of November, 1899.

FRANK L. COOMBS,
Attorney for Plaintiff.

Filed November 3d, 189?. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

9 In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CALIFORNIA DRY DOCK COMPANY, DEFENDANT. } No. 12817.

Stipulation waiving trial by jury.

Now comes the plaintiff, by Frank L. Coombs, United States attorney, and Marshall B. Woodworth, assistant United States attorney for the

northern district of California, its attorneys, and the defendant, by Messrs. Page, McCutchen, Harding, and Knight, its attorneys, and waives a jury in the above-entitled cause, and stipulate that said cause be tried by the court sitting without a jury.

FRANK L. COOMBS,
United States Attorney, for Plaintiff.
MARSHALL B. WOODWORTH,
Assistant United States Attorney, for Plaintiff.
PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

(Endorsed:) Filed July 27th, 1900. Southard Hoffman, clerk.

10 In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
CALIFORNIA DRY DOCK COMPANY, DEFENDANT.

Stipulation of parties substituting defendant.

It is hereby stipulated and agreed that pending the hearing of this cause the defendant, California Dry Dock Company, sold and transferred to the Mission Rock Company, a corporation, its title to the property sued for therein, and that the Mission Rock Company thereupon entered into and now has the sole possession thereof. It is stipulated that the Mission Rock Company may be substituted as defendant in this action as of the date of June seventh, 1900, and that all proceedings herein be continued as against the said substituted defendant with the same force and effect as they would have against the original defendant if no substitution had been made.

It is further stipulated that the appearance of Messrs. Page, McCutchen, Harding & Knight as attorneys for the Mission
11 Rock Company is hereby entered and that amended and supplemental pleadings as may be ordered by the court be filed against the Mission Rock Company.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.
PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

Order substituting defendant.

On reading and filing the foregoing stipulation, and it appearing to the court that since the submission of this cause all the title of The California Dry Dock Company in and to the property sued for in this cause has been sold and transferred to the Mission Rock Company, a corporation, and that said last-named company is in sole possession of the said property, and it further appearing that the Mission Rock Company is the proper party to this suit and should be substituted as defendant in place

of The California Dry Dock Company, and it further appearing that said Mission Rock Company, by Page, McCutchen, Harding & Knight, its attorneys, and attorneys for The California Dry Dock Company, applies for the said substitution and that the attorneys of the United States consent:

It is ordered as follows: That the Mission Rock Company be, and it is hereby, substituted as defendant in this cause in place of The
12 California Dry Dock Company, nunc pro tunc, as of June 7th, 1900, and that all proceedings in this cause be taken and this cause continued against the Mission Rock Company as such substituted defendant.

It is further ordered that amended and supplemental pleadings be filed in this cause against the Mission Rock Company as defendant, and that the said defendant make answer thereto, and that the same be filed as of June 7, 1900, nunc pro tunc.

JAS. H. BEATTY, *Judge.*

(Endorsed:) Filed January 11, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for The California Dry Dock Company (a corporation), defendant.

Amended and supplemental complaint.

Now comes the plaintiff, the United States of America, and by leave of court first had and obtained, files this its amended and supplemental complaint, and alleges:

13 I.

That the defendant Mission Rock Company is, and at all times since a period anterior to June 6th, 1900, has been, a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State and northern district of California.

II.

That heretofore, to wit, on the 2d day of January, 1870, the said plaintiff was, and for a long time previous thereto had been, and continuously since has been and now is, the owner and seised in fee, and entitled to the possession, of all that certain tract of land situate in the State and northern district of California and described as follows, to wit:

Commencing at a point in the Bay of San Francisco, State and northern district of California, distant 3,570 feet southeasterly from the southerly corner of Brannan and Second streets, said distance being

measured along the extension, southeasterly of the southwesterly line of Second street; thence in a southwesterly direction at right angles with said line of Second street extended, 500 feet; thence at right angles southeasterly 800 feet; thence at right angles northeasterly 800 feet; thence at right angles northwesterly 800 feet; thence at right angles southwesterly 300 feet to the point of commencement.

Said tract of land, being a square including the rock known as
14 Mission Rock, and containing 14 69-100 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian.

III.

That after'ards, to wit, on the 1st day of May, 1878, and while the plaintiff was the owner of and entitled to the possession of said tract of land as aforesaid, the said The California Dry Dock Company wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff therefrom and from the whole thereof, and from thence up to the 6th day of June, 1900, wrongfully and unlawfully withheld possession of the said premises from the plaintiff, to its damage in the sum of two hundred and fifty thousand (250,000) dollars.

That prior to said sixth day of June, 1900, to wit, on or about the 21st day of September, 1899, this plaintiff brought in this court its certain action of ejectment against the said The California Dry Dock Company for the recovery of the possession of the premises aforesaid and for damages as aforesaid, which said action was on the said sixth day of June, 1900, still pending and undetermined in this court.

That on said sixth day of June, 1900, the said The California Dry Dock Company executed a written instrument of deed and delivered the same to the Mission Rock Company, defendant herein, wherein and whereby it purported to convey to the said defendant all of the lands and premises hereinbefore described and sued for by this plain-
15 tiff, and the said defendant thereupon entered into possession of the said premises and now wrongfully and unlawfully withholds the same from the plaintiff, to its damage in the sum aforesaid.

IV.

That heretofore, to wit, on the day of December, 1900, this honorable court, on stipulation of the parties in the said cause originally pending herein, and on the request and motion of counsel of the Mission Rock Company, then and there duly authorized to enter an appearance for the Mission Rock Company, defendant, made and entered an order in said cause substituting the Mission Rock Company as defendant in place of The California Dry Dock Company, previously defendant therein as aforesaid, and ordering that all further proceedings in said cause be continued against said Mission Rock Company, in place of the California Dry Dock Company, and that the plaintiff be authorized to file in said cause an amended and supplemental complaint against the Mission Rock Company, defendant, substituted as aforesaid, and that the said defendant enter its appearance therein, and answer the said amended and supplemental complaint.

V.

That the plaintiff is informed and believes, and upon such information and belief so avers, that the value of the rents, issues, and profits of said tract of land, ever since the said wrongful and unlawful entry of the defendant thereon, has been, and now is, the sum of five thousand (5,000) dollars per annum.

16 Wherefore the said plaintiff prays for judgment against the said defendant for the possession of all the said tract of land aforesaid, and for the sum of two hundred and fifty thousand (250,000) dollars for the damages aforesaid, and for one hundred and five thousand (105,000) dollars for the value of the rents, issues, and profits aforesaid, and for costs of suit.

FRANK L. COOMBS,
United States Attorney,
And MARSHALL B. WOODWORTH,
Assistant United States Attorney.

(Endorsed:) Service of the within amended and supplemental complaint by copy admitted this 27th day of December, 1900.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

Filed January 11, 1901, nunc pro tunc as of June 7, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

17 In the circuit court of the United States, for the ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for The California Dry Dock Company (a corporation), defendant.

Answer to amended and supplemental complaint.

Now comes the Mission Rock Company, defendant in the above-entitled cause, substituted for The California Dry Dock Company, and answering unto the amended and supplemental complaint of the plaintiff avers as follows:

I.

It admits that the defendant is and has been a corporation as averred in the complaint.

II.

It denies that on the second day of January, 1870, the plaintiff was, or for a long time previous thereto had been, or continuously since or at any time since has been or now is the owner or seised in fee, or entitled to the possession of all or any part of the land described in the complaint.

18

III.

It denies that on the first day of May, 1878, or at any time, while the plaintiff was the owner or entitled to the possession of the said land or otherwise, The California Dry Dock Company unlawfully entered in or upon the same, or ousted or ejected the plaintiff therefrom, or the whole or any part thereof, or that the said The California Dry Dock Company from thence up to the 6th day of June, 1900, or at any time, wrongfully or unlawfully withheld possession of the said premises, or any part therefrom, from the plaintiff to its damage in the sum alleged, or in any sum.

The defendant admits that prior to the said sixth day of June, 1900, to wit, on or about the 21st day of September, 1899, the plaintiff brought in this court the action in the amended and supplemental complaint described and that said action was on the sixth day of June, 1900, pending and undetermined in this court, and it admits that on said day The California Dry Dock Company executed and delivered to this defendant the instrument of conveyance in said complaint described, and that the defendant thereupon entered into possession of the said premises and that it now withholds the same from the plaintiff; but it denies that it withholds the same to the damage of the plaintiff in the sum alleged or in any sum.

The defendant further avers that the said The California Dry Dock Company, grantor of this defendant was from the first day of May, 1878, and up to the sixth day of June, 1900, seised and owner in fee of

19 the premises sued for, and that since said date this defendant, as its grantee, has been and now is seised and owner in fee and in the lawful possession thereof, and that no other person or corporation is the owner thereof, and that the plaintiff was not at the time alleged in the amended and supplemental complaint or at any time since said date, and is not now the owner or entitled to the possession of the said premises, or any part thereof.

IV.

It denies that the value of the rents, issues, and profits of the said lands have been or are the sum of five thousand dollars per annum or any sum, and it further denies that it at any time entered unlawfully upon the said land.

Wherefore, it prays judgment that plaintiff's action be dismissed.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

(Endorsed:) Service of a copy of the within answer is hereby admitted this 10th day of January, 1901.

MARSHALL B. WOODWORTH and
FRANK L. COOMBS,
Attorneys for Plaintiff.

Filed January 11, 1901, nunc pro tunc as of June 7, 1900. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

COPY BOUND CLOSE IN CENTER

20 In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY, SUBSTITUTED FOR California Dry Dock Company, defendant.

Findings.

The above cause having come on regularly to be heard before the court, a jury having been waived, the court having heard and considered the pleadings and the evidence, hereby files its findings of fact and conclusions of law:

I.

The defendant, Mission Rock Company, is and since a date anterior to June 6, 1900, was a corporation organized and existing under the laws of the State of California, and pending the hearing of this cause became, by virtue of a deed of grant, bargain, and sale from The California Dry Dock Company, dated June 6th, 1900, the owner of all the title and interest of The California Dry Dock Company in and to the premises in controversy, and thereupon entered into and now holds the possession of the same.

21 On request of the Mission Rock Company and proof of the fact that the said company had acquired the interest of The California Dry Dock Company in the lands sued for and by consent of the plaintiff, this court made an order substituting the Mission Rock Company for The California Dry Dock Company as defendant, and continuing this action against said Mission Rock Company as defendant.

II.

At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than twenty and less than forty feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause marked Exhibit "A."

III.

The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called "Mission Rock" had an area of fourteen one-hundredths (14-100) of an acre; the other had an area of one one-hundredth (1-100) of an acre. These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides to the

22 extent that they were covered and uncovered by the flow and ebb of the tide varied from ten to twenty-five feet, depending on

their steepness. Both rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half of a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divide the lands sued for from the mainland and surrounded and now surround them.

IV.

The lands described in the complaint were not, at the date of the admission of the State of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican Governments.

V.

No approved plat of the exterior limits of the city of San Francisco, as provided by the terms of section 5 of the act of July 1, 1864 (13 Stat., 332), has been filed or rendered to the General Land Office of the United States, or of the State of California. The lands sued for in this action are within such exterior limits.

VI.

On the thirteenth day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

23 "EXECUTIVE MANSION, *January 13, 1899.*

"It is hereby ordered that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

"WILLIAM MCKINLEY."

VII.

On the day of March, 1864, the United States surveyor-general for the State of California extended the public surveyors so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

VIII.

On April 4th, 1870, the governor of the State of California approved an act of the legislature of the State entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor," which act was printed in the Statutes of California for the years 1870–1871, at page 801, is hereby referred to and made part hereof.

The lands therein described include the lands sued for in this action.

On the 11th day of July, 1872, the State of California, in con-
24 formity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

After execution of the said patent the said Tichenor executed and delivered a deed of grant, bargain, and sale, dated May 1st, 1878, purporting to convey the said lands to The California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named company has not since said date conveyed to any person or corporation the said lands.

IX.

The California Dry Dock Company, upon going into possession of said lands so conveyed undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about four acres, upon which extensive warehouses were built by it, and wharves erected for the accommodation of shipping.

Since the issuance of the State patent hereinbefore referred to the patentee thereof up to May 1st, 1878, The California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present time, have been in continuous and uninterrupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof.

X.

On April 7th, 1890, Col. Geo. H. Mendell, then in charge of the Corps of Engineers of the United States Army on the Pacific coast, caused to be served on the California Dry Dock Company the following notice:

"UNITED STATES ENGINEER OFFICE,
"No. 533 KEARNY STREET,
"*San Francisco, Cal., April 7th, 1890.*

"Captain OLIVER ELDRIDGE,

"*President California Dry Dock Company, 303 California Street, San Francisco, Cal.*

"SIR: Under the provisions of section 12 of the river and harbor act of August 11th, 1888 (a copy of which is enclosed), a board of engineer officers was appointed to establish the harbor lines of San Francisco Harbor and adjacent waters. There is transmitted herewith, for your information, a map, upon which are shown the limiting lines of wharves and the line beyond which no deposits shall hereafter be made, at Mission Rock, as established by the board and approved by the Secretary of War March 24th, 1890.

"Very respectfully,
"G. H. MENDELL,
"*Colonel, Corps of Engineers.*"

The limits referred to in the above letter, and delineated on the map, are in effect the limits of "Mission Rock" as improved at that time.

CONCLUSIONS OF LAW.

Upon the foregoing facts, I find that the title to the lands described in the complaint is in the United States and that it is entitled to judgment for the possession thereof. Let judgment be entered accordingly.

JAS. H. BEATTY, *Judge.*

Agreed to.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.

In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY, SUBSTITUTED FOR CALIFORNIA DRY DOCK COMPANY, defendant.

Stipulation and supplemental finding.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following supplemental finding of fact may be, and is hereby, made part of the findings heretofore signed by Hon. James H. Beatty and agreed to by counsel for the respective parties, just as if the same had been originally incorporated in said findings, signed and agreed to as aforesaid; and said parties hereby expressly waive any and all manner of objection to said supplemental finding or to any other matter or thing connected therewith.

Dated January 10, 1901.

FRANK L. COOMBS,
United States Attorney, for Plaintiff.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

Said supplemental finding of fact, as hereby agreed to, is as follows:

The title of the United States, as successor of the Mexican Republic, under the treaty of Guadalupe-Hidalgo, to the land in controversy, has not since been divested by patent or other conveyance, and the title thereto is still in the United States, unless the same passed to the State of California by virtue of the admission of the State under the act of Congress, or unless the United States relinquished title thereto under subsequent acts of Congress.

JAS. H. BEATTY, *Judge.*

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

28 In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for California Dry Dock Company (a corporation), defendant. } No. 12817.

Judgment on findings.

This cause came on regularly for trial upon the third day of August, 1900, being a day in the July, 1900, term of said court, before the court, sitting without a jury, a trial by jury having been duly waived by stipulation of the attorneys for the respective parties filed herein. Frank L. Coombs, esq., United States attorney, and Marshall B. Woodworth, esq., assistant United States attorney, appeared upon behalf of the plaintiff, and Charles Page, esq., appeared upon behalf of the defendant; and thereupon evidence, oral and documentary, upon behalf of the respective parties was introduced and closed, and the cause, after arguments of the
29 attorneys, was submitted to the court for consideration and decision. And the court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the court that the United States of America, plaintiff herein, have and recover of and from Mission Rock Company, a corporation, defendant herein, the possession of all that certain tract of land situate in the State and northern district of California, and described as follows, to wit:

Commencing at a point in the bay of San Francisco, State and northern district of California, distant 3,570 feet southeasterly from the southerly corner of Brannan and Second streets, said distance being measured along the extension, southeasterly of the southwesterly line of Second street; thence in a southwesterly direction at right angles with said line of Second street extended 500 feet; thence at right angles southeasterly 800 feet; thence at right angles northeasterly 800 feet; thence at right angles northwesterly 800 feet; thence at right angles southwesterly 300 feet to the point of commencement.

Said tract of land being a square including the rock known as Mission Rock and containing 14 69-100 acres, more or less, and being a
30 fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian.

And it is further considered and adjudged that said plaintiff recover from said defendant its costs in this behalf expended, taxed at $48.40.

Judgment entered January 23d, 1901.

SOUTHARD HOFFMAN, *Clerk.*

A true copy. Attest:
[SEAL.]

SOUTHARD HOFFMAN, *Clerk.*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed.) Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

31 In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), DEFENDANT. } No. 12817.

Certificate to judgment roll.

I, Southard Hoffman, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certifythat the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said circuit court the 23d day of January, 1901.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk.*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed:) Judgment roll. Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

32 In the circuit court of the United States, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
CALIFORNIA DRY DOCK COMPANY, DEFENDANT. }

Opinion.

Frank L. Coombs, Un ted States attorney, and Marshall B. Woodworth, assistant United States attorney, for plaintiff. Page, McCutchen, Harding & Knight, for defendant.

What has long been known as "Mission Rock," situated in the bay of San Francisco, about one-half mile east of the shore of the land upon which the city of San Francisco is situated, consists of two islands of rocks projecting above high tide, having areas respectively of 14-100 and 1-100 acres. So far as known they have always been barren rocks with shores so steep that they are surrounded with very little land or rock that is uncovered by the tide. California's admission act of September 9, 1850, was similar in its provisions to those of the admission acts
33 of other States. Claiming the title through such admission act to the submerged lands surrounding these rocks, the State by its legislature, on April 4, 1870, authorized the sale of the same to one Tichenor, and he having complied with all the conditions prescribed, did on July 11, 1872, receive from the State a patent for a tract of eight hundred feet square, surrounding these rocks "containing 14-3500 acres, exclusive of said rocks." By mesne conveyances the defendant now has whatever title to the premises the State could convey. The defendant has by the deposit of rock and other material filled in the space surrounding these rocks to such extent that the area above water is now, as shown by a map introduced by defendant and marked Exhibit No. 1, 3

and 9-10 acres, including, as is understood, the area of the original islands or rocks. The plaintiff brings this action for the possession of all the area conveyed by the State, and also that of the islands, being a total of 14 and 69-100 acres.

The question is whether California had any title to what it attempted to convey. It can not be doubted that "tide lands" become upon the admission of a State its property. It is sufficient to refer to but one of the many adjudications. Illinois Central Railroad vs. Illinois, 146 U. S., 435, says: "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impair-
34 ment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States." If any of the area surrounding these rocks is within the term "tide lands," it is evident from the testimony that but a small portion thereof is. The line around these islands to which the low tide recedes is not clearly fixed by the evidence. The only witness examined on this question, aided by plaintiff's maps, Exhibits H and G, said there was originally "not very much" land around these rocks uncovered by the ebbing tide; that it "may vary from 10 to 25 feet, depending upon the steepness of the slope of the rock. That, however, is a mere estimate." Defendant's said Exhibit No. 1 has upon it an irregular line marked "Line of filling about level at low water," within which is included a total area of 3 and 9-100 acres, from which, deducting that of the islands, 15-100 acres, leaves 2 and 94-100 acres, which, admitting defendant's showing as correct, is the maximum area which the State could convey. The State did attempt to convey what under no theory of the law could be termed tide lands, but which it conveyed as submerged lands. If it could do so, no reason exists why it may not convey as submerged lands the entire bottom of San Francisco Bay.

Plaintiff claims that "tide lands" are only those adjoining the mainland on the sea, on bays, inlets, and arms of the sea, and that they do not include those lands surrounding islands, especially those in a bay. So far as my observation goes the Government has always acquired
35 and retained the islands in the bays of important seaports for fortification and other governmental purposes. If the State can hold as tide lands a strip around such islands the Government would be absolutely excluded from its island possessions except by paying tribute to the State or its grantees. The defendant's counsel says the Government may meet such an emergency through its power to control the navigable waters for commercial purposes, and that the purchaser of such tide or submerged lands "would take the title, subject always to the control of the United States, over the waters covering them." This would be a circuitous way by which to protect the public or Government interests as well as through the exercise of arbitrary power. That it may be done the authorities seem to justify, but the same authorities also hold that the State can claim title to convey such tide lands only "when that can be done without substantial impairment of the interest of the public—

of the Government—to surround the islands in a bay, which it needs, with an adverse title. Plaintiff has cited a number of authorities in support of its claim that tide lands do not pertain to the shores of islands such as these, but they are not decisive of the question, because it was not directly involved in any of the cases so far as I can observe.

As it has been held that tide lands can not be controlled by the State to the detriment of the public welfare; as the islands within the bay of an important seaport are of great value to the public and to the
36 Government, and as it is absolutely necessary that the approach to them must be unobstructed to make them available, the court should hesitate to allow the claim made by the defendant unless supported by some clear statutory or judicial authority; and in the absence of either that is satisfactory, it must be and is held that the lands surrounding these islands were not within the denomination of tide lands, and that the State had no title thereto to convey.

The act of Congress approved July 1, 1864 (13 Stat., 332), by the fifth section, provided for the relinquishment to San Francisco of all lands within its limits, but it accepted from the operation of such relinquishment such lands as may be designated by the President within one year after the rendition to the General Land Office by the surveyor-general of an approved plat of the exclusive limits of San Francisco. No such plat has yet been sent to the General Land Office, but the President did, on January 13, 1889, designate these islands as permanently reserved for naval purposes, thereby preserving to the Government the reservation of its rights provided by the statute.

As the very great importance of this case will lead to its final determination by higher courts, it is deemed unnecessary to enter largely into the discussion of the questions involved, and without further suggestion I content myself with the statement of my conclusion in favor of
37 judgment of possession for the plaintiff, which is accordingly ordered.

Dated this 11th day of December 1900.

BEATTY, *Judge.*

(Endorsed:) Filed December 14, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the United States circuit court, in and for the ninth circuit and northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY, SUBSTITUTED IN PLACE of California Dry Dock Company, defendant.

Bill of exceptions.

Be it remembered that on the signing by the court of the findings in the above-entitled cause and the order of judgment therein in favor of the plaintiff, the defendant, by its attorneys, duly assented to the facts of the cause as found by the court and filed herein as its finding, but excepted

to the ruling of the court thereon declaring and deciding that judg
38 ment thereon should be entered in favor of defendant as requeste
by it. And whereas the said exception does not otherwise appea
of record, I have hereunto set my hand and seal this 2d day of January
1901.

JAS. H. BEATTY.

We hereby agree to the correctness of the foregoing bill of exceptions.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. B
W. B. Beaizley, deputy clerk.

In the United States circuit court, in and for the ninth circuit, northern
district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), DEFENDANT.

Petition for writ of error.

Mission Rock Company, defendant in the above-entitled action
39 feeling itself aggrieved by the decision and judgment of this hon
orable court entered in this cause on the 23d day of January, A. D
1901, does, through and by its attorneys, Page, McCutchen, Harding &
Knight, respectfully petition and pray this court for the allowance of
writ of error from said decision and judgment to the United State
circuit court of appeals in and for the ninth judicial circuit, under an
according to the laws of the United States in that behalf made and pro
vided; and also that an order may be made fixing the amount of securit
and bond which defendant should give and furnish upon said writ o
error, and that upon the giving of said security and bond which defend
ant should give and furnish upon said writ of error, and that upon th
giving of said security and bond all further proceedings in this court b
suspended and stayed until the determination of said writ of error b
said circuit court of appeals in and for the ninth judicial circuit, an
prays that a transcript and record of the proceedings in the cause, dul
authenticated, may be transmitted to said circuit court of appeals.

Your petitioner and appellant herewith presents and files with th
clerk of the honorable court its assignment of errors.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Petitioner and Appellant.

40 *Order allowing writ of error.*

It is ordered that the prayer of said petitioner be allowed and th
said writ of error issue as prayed for.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. B
W. B. Beaizley, deputy clerk.

In the circuit court of the United States for the ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY, DEFENDANT.

Assignment of errors.

Now comes the defendant, Mission Rock Company, and files its assignment of errors in the above-entitled cause as follows, to wit:

1. That the circuit court erred in its decision and judgment that, upon the findings of fact made by it, the plaintiff was entitled to judgment against the defendant for the recovery of the premises described in the complaint.

41 2. That the circuit court erred in its decision and judgment that, upon the findings of fact made by it, the defendant was not entitled to judgment against the plaintiff.

3. That the circuit court erred in deciding that the title to that portion of the lands described in the complaint which was constantly covered by the tidal waters of the bay of San Francisco remained and was, after the admission of the State into the Union, in the United States and did not vest in the State of California.

4. That the circuit court erred in deciding that that portion of the lands described in the complaint and which are shown by the findings to have been and to be above the line of ordinary high-water mark, were and are lands the title whereof was and remained, after the admission of the State of California into the Union, in the United States and not in the State of California.

5. That the circuit court erred in its decision and judgment holding and adjudging that the title to that portion of the lands described in the complaint which were constantly submerged by the tidal waters of the bay of San Francisco did not vest in the State of California on admission of the State into the Union.

6. That the circuit court erred in its decision and judgment holding and adjudging that the title to that portion of the lands described in the complaint which by the findings and evidence was shown to lie above the line of ordinary high tide, did not, on the admission of the State of California into the Union, vest in the said State.

42 7. That the circuit court erred in its decision and judgment holding and adjudging that under the act of July 1, 1864 (13 Stat., 332) relinquishing to the city of San Francisco the lands described in said act, the United States excepted from such relinquishment the lands described in the complaint or any portion thereof.

8. That the circuit court erred in holding and adjudging that it was within the power of the President under the said act to designate the said lands, or any part of them, as excepted from the relinquishment made in said act.

9. That the circuit court erred in holding and adjudging that the title to the said lands described in the complaint did not vest under said act in the city of San Francisco.

10. That the circuit court erred in deciding and holding that after relinquishment of the title to said lands by the United States by said

act, the title conveyed by said act was divested by the act of the President referred to in the findings.

11. That the circuit court erred in deciding and holding that the executive order of the President excepted from the grant to San Francisco more than the specific acreage of the lands sued for lying above high-water mark stated in the said order.

12. That the circuit court erred in deciding and holding that all of said lands in the complaint described were not part of the lands covered by navigable waters of the State of California.

13. That the circuit court erred in deciding and holding that
43 the said lands described as lying above high-water mark were lands which did not vest in the State on her admission into the Union.

14. That the circuit court erred in deciding and holding that an action of ejectment would lie for the recovery of lands the title to which had been fully relinquished by the United States in 1864 in favor of the city of San Francisco, subject to a right of subsequent reservation by the President.

15. That the circuit court erred in holding and deciding that the reservation in the said act of 1864 was not void, and that by the act of the President, nearly forty years later, reserving said lands, the title thereto again became vested in the United States.

PAGE, MCCUTCHEN, HARDING AND KNIGHT,
Attorneys for Defendant.

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

44 In the United States circuit court in and for the ninth circuit northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), defendant.

Order staying proceedings.

The defendant, Mission Rock Company, having this day filed its petition for a writ of error from the decision and judgment of this court entered herein, to the United States circuit court of appeals in and for the ninth judicial circuit, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States circuit court of appeals in and for the ninth judicial circuit, and said petition having this day been allowed:

Now, therefore, it is ordered that upon the said defendant, Mission Rock Company, filing with the clerk of this court a good and
45 sufficient bond in the sum of twenty-five thousand dollars, said bond to be approved by the court, that all further proceedings in

this court be, and they are hereby, suspended and stayed until the determination of said writ of error by said United States circuit court of appeals.

Dated January 23, 1901.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

Supersedeas and cost bond on writ of error.

Know all men by these presents that Mission Rock Company, a corporation, as principal, and Pacific Surety Company, a corporation, as surety, are held and firmly bound unto the United States of America in the full and just sum of twenty-five thousand dollars, to be paid to the said the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, in the year of our Lord one thousand nine hundred and one.

Whereas lately in the circuit court of the United States in and for the ninth circuit, northern district of California, in a suit pending in said court between the United States of America, plaintiff, and Mission
46 Rock Company, a corporation, defendant, judgment was rendered and entered on the 23d day of January, A. D. 1901, against the said defendant Mission Rock Company, a corporation, and in favor of said plaintiff, and the said defendant, Mission Rock Company, a corporation, having obtained from the same court its writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the above-named plaintiff, citing and admonishing it to appear at the United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California:

Now, the condition of the above obligation is such that if the said Mission Rock Company, a corporation, defendant (plaintiff in error), shall prosecute the said writ to effect, and answer all damages and costs, and all sums of money that may be recovered for the use and detention of the property and the costs of suit and just damages for delay, if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[Corporate seal of Mission Rock Company.]

MISSION ROCK COMPANY,
By WM. BABCOCK,
President.

W. F. RUSSELL,
Secretary.

[Corporate seal of Pacific Surety Company.]

PACIFIC SURETY COMPANY,
By WALLACE EVERSON,
President.

A. P. REDDING,
Secretary.

[Internal revenue stamps to the amount of 62½c. attached and canceled.]

47 UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Personally appeared before me, A. P. Redding, on this thirtieth day of January, one thousand nine hundred and one, known to me to be the secretary of the Pacific Surety Company, the corporation described in and which executed the annexed bond of Mission Rock Company, defendant, as surety thereon, and who, being by me duly sworn, deposes and says: That he resides at Menlo Park, in the State of California; that he is the secretary of the said Pacific Surety Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of California; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Mission Rock Company, defendant, is the corporate seal of the said Pacific Surety Company, and was thereto affixed by order and authority of the board of directors of said company; that he signed his name thereto by like order and authority as secretary of said company; that he is acquainted with Wallace Everson and knows him to be the president of said company; that the signature of said Wallace Everson subscribed to said bond is in the genuine handwriting of said Wallace Everson, and was thereto subscribed
48 by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities of every nature whatsoever by more than the sum of two hundred and fifty thousand dollars ($250,000.00).

[Corporate seal of Pacific Surety Company.] A. P. REDDING.

Sworn to, acknowledged before me, and subscribed in my presence this 30th day of January, 1901.

[NOTARIAL SEAL.] O. A. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California.

Whereas the Pacific Surety Company, a corporation duly incorporated under the laws of the State of California, has deposited with me its charter or articles of incoporation and the statement required by section 3 of an act of Congress approved August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act; that it has a paid-up capital of not less than $250,000 in cash or its it equivalent, and that it is able to keep and perform its contracts:

Now, therefore, the said Pacific Surety Company is hereby granted authority to do business under said act in the said State of California, and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in
49 which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

[SEAL.] JOHN W. GRIGGS,
Attorney-General.

DEPARTMENT OF JUSTICE, WASHINGTON, D. C.,
November 25, 1898.

DEPARTMENT OF JUSTICE,
Washington, D. C., April 18, 1900.

[10 c. int. rev. stamp hereto attached and canceled.]
The annexed is a true copy of an original authorization to do business, issued by the Attorney-General under the act of Congress approved August 13, 1894.

Witness my hand and seal of the Department.

[Seal of Department of Justice.]

CECIL CLAY,
Chief Clerk.

(Endorsed:) The form of the within bond and the sufficiency of the surety approved this 30th day of January, 1901.

WM. W. MORROW, *Judge.*

Filed January 30, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

50 In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for California Dry Dock Company, defendant. } No. 12817.

Clerks certificate to record.

I, Southard Hoffman, clerk of the circuit court of the United States, ninth judicial circuit, northern district of California, do hereby certify the foregoing forty-six (46) written pages, numbered from 1 to 46 inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $28.00, and that said amount was paid by the attorneys for the defendant above named.

51 In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 6th day of February, A. D. 1901.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Ten cent U. S. int. rev. stamp, canceled.]

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the ninth circuit, northern district of California, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some

of you, between Mission Rock Company, a corporation, defendant and plaintiff in error, and United States of America, plaintiff and defendant in error, a manifest error has happened to the great damage of the said Mission Rock Company, a corporation, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in
52 this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 12th day of February next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of January, in the year of our Lord one thousand nine hundred and one.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

Allowed by:

WM. W. MORROW, *Judge.*

Service of within writ and receipt of a copy thereof is hereby admitted this 30th day of January, A. D. 1901.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Defendant in Error.

53 The answer of the judges of the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the United States circuit court of appeals for the ninth circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

SOUTHARD HOFFMAN, *Clerk.*

(Endorsed:) No. 12817. Circuit court of the United States, ninth circuit, northern district of California. Mission Rock Company (a corporation), plaintiff in error, vs. United States of America, defendant in error. Writ of error. Filed January 30, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

54 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 12th day of February next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth circuit, northern district of California, in a certain action numbered 12817, wherein Mission Rock Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William W. Morrow, judge of the United States circuit court, ninth circuit, northern district of California, this 30th day of January, A. D. 1901.

WM. W. MORROW, *Judge.*

Service of within citation and receipt of a copy thereof is hereby admitted this 30th day of January, 1901.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Defendant in Error.

55 (Endorsed:) No. 12817. Circuit court of the United States, ninth circuit, northern district of California. Mission Rock Company (a corporation), plaintiff in error, vs. The United States of America, defendant in error. Citation. Filed January 30, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

(Endorsed:) No. 682. In the United States circuit court of appeals for the ninth circuit. Mission Rock Company (a corporation), plaintiff in error, vs. The United States of America, defendant in error. Transcript of record. In error to the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California. Filed February 6, A. D. 1901.

F. D. MONCKTON, *Clerk.*

56 In the United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY (A CORPORATION), PLAINTIFF in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 682.

In error to the circuit court of the United States for the northern district of California.

Before Gilbert, Ross, and Morrow, circuit judges.

Ross, circuit judge, delivered the opinion of the court:

This was an action of ejectment originally brought by the United States against the California Dry Dock Company, a corporation, for the recovery

of the possession of a tract of land containing fourteen and sixty-nine one-hundredths acres, and including the rock known as Mission Rock and a small adjacent rock in the Bay of San Francisco, together with damages for the withholding of the premises, and rents, issues, and profits thereof, aggregating $355,000. The defendant Mission Rock Company, a California corporation, having, pending the action, acquired all the right, title, and interest of the California Dry Dock Company in the premises sued for, was by an order of the court, based upon the request of the respective parties, substituted for the original defendant and the action continued against it. The case comes before us upon the
57 judgment roll and upon findings of fact which appear to have been agreed to by the respective parties. From those findings it appears that the title of the United States to the lands in controversy under the treaty of Guadalupe Hidalgo, as successor of the Mexican Republic, has not since been divested by patent or other conveyance, and that the title thereto is still in the United States, unless the same passed to the State of California by virtue of the admission of that State into the Union under the act of Congress of September 9, 1850, or unless the United States relinquished its title thereto under subsequent acts of Congress. At the time of the admission of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than twenty and less than forty feet above such high water, and of other lands contiguous thereto and surrounding the rocks or islands, which were completely submerged, and over which the daily tides continuously flowed and ebbed. The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State into the Union were as follows: The one called Mission Rock had an area of fourteen one-hundredths of an acre, the other an area of one one-hundredth of an acre. These rocks or islands rose abruptly out of the bay. Their sides, to the extent that they were covered and uncovered by the flow and ebb of the tide, varied from ten to twenty-five feet, depending on their steepness. Both rocks were barren, without soil or water, and were of no value for agricultural or mining purposes. They lay at a distance of about half a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable waters divided and still
58 divide the lands sued for from the mainland, and surrounded and now surround them, and they were not at the date of the admission of California into the Union within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican Governments. No approved plat of the exterior limits of the city of San Francisco, as provided by the terms of section 5 of the act of Congress of July 1, 1864 (13 Stats., 332), has been filed or rendered to the General Land Office of the United States or of the State of California. The lands sued for are within such exterior limits. On the 13th day of January, 1899, the President of the United States, purporting to act in conformity with that act of Congress, issued the following order:

"EXECUTIVE MANSION, *January 13, 1899.*

"It is hereby ordered that Mission Island and the small islands southeast thereof, designated on the official plat on file in the General Land

Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

"WILLIAM MCKINLEY."

On the day of March, 1864, the United States surveyor-general for the State of California extended the public surveys so as to comprehend and include the rocks or islands and the lands in controversy. On April 4, 1870, the governor of the State of California approved an act of the legislature of the State entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor" (Stats. 1870, 1871), which lands therein described included the lands sued for in this action. On
59 the 11th day of July, 1872, the State of California, in conformity with the act of April 4, 1870, issued its patent for the lands in controversy herein to Tichenor, purporting to convey the same to him, which patent was duly recorded. After the execution of the patent Tichenor executed a deed of grant, bargain, and sale, of date May 1, 1878, purporting to convey the lands in controversy to the California Dry Dock Company, which thereafter, and on the 6th day of June, 1900, executed to the defendant Mission Rock Company a like deed to the same lands, which still holds whatever rights it thereby acquired, and into the possession of which lands the Mission Rock Company then entered and has ever since remained. After the execution of the deed by Tichenor to the California Dry Dock Company that company undertook the improvement of the lands covered by the deed by filling in portions of the submerged lands immediately around and contiguous to the rocks or islands with many thousands of tons of rock, thus increasing the available area of the lands to about four acres, upon which extensive warehouses were built by it and wharves erected for the accommodation of shipping. Ever since the issuance of the patent by the State of California to Tichenor, the patentee and those holding under him have been in the continuous and uninterrupted possession of the lands covered by the patent, using the same and the improvement thereon for commercial purposes, and claiming to be the absolute owner thereof. On the 7th day of April, 1890, Colonel George H. Mendell, then in charge of the corps of engineers of the United States Army on the Pacific coast, caused to be served on the California Dry Dock Company the following notice:

60 "UNITED STATES ENGINEER'S OFFICE,
"No. 533 KEARNY STREET,
"*San Francisco, Cal., April 7th, 1890.*

"Captain OLIVER ELDRIDGE,
"*President California Dry Dock Company,*
"*303 California Street, San Francisco, Cal.*

"SIR: Under the provisions of section 12 of the river and harbor act of August 11th, 1888 (a copy of which is enclosed), a board of engineer officers was appointed to establish the harbor line of San Francisco Harbor and adjacent waters. There is transmitted herewith for your

information a map upon which are shown the limiting lines of wharves and the line beyond which no deposits shall hereafter be made, at Mission Rock, as established by the board and approved by the Secretary of War March 24th, 1890.

"Very respectfully,

G. H. MENDELL,
"*Colonel, Corps of Engineers.*"

The limits referred to in this letter and delineated in the map are, in effect, the limits of Mission Rock as approved at that time.

Upon the facts so found and agreed to by the respective parties the court below gave the Government judgment for the possession of the premises sued for, with costs, but without any damages, rents, issues, or profits. The appeal is from that judgment.

From the foregoing statement of the case it will be seen that the judgment is not limited to the two rocks or islands embraced in the Executive order of January 13, 1899, the one covering fourteen one-hundredths and the other one one-hundredth of an acre, but awards the Government the entire tract of fourteen and sixty-nine one-hundredths acres,
61 including the warehouses and other improvements constructed by the defendant and its predecessors in interest. The case therefore involves not only legal questions of great importance, but also property rights of great value.

As no part of the property in controversy ever was within any private or pueblo grant, the title to the whole tract in question passed to the United States as the successor of the Republic of Mexico. The questions are, Has the title to the whole or any part of the premises passed out of the United States, and if so, subject to what, if any, conditions?

The act of Congress of September 9, 1850, admitting California into the Union "on an equal footing with the original States in all respects whatever," was subject to the "express condition that the people of said State shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and in no case shall nonresident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor: Provided, That nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the constitution of that State." Substantially the same language was used by Congress in the admission of each of the new States. There
62 is, therefore, and can be, as said by the Supreme Court in Illinois Central Railroad *v.* Illinois, 146 U. S., 387, 434, "no distinction between the several States of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits." In that case the court further declared it to be the settled law of this country "that the ownership of and dominion and sovereignty over lands covered by

tide waters within the limits of the several States belonged to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States." And speaking with direct reference to the title to the soil under the tide waters of the bay of San Francisco, the same court held in The Weber *v.* Harbor Commissioners, 18 Wall., 57, 65, that although such title was acquired by the United States by the cession from Mexico, equally with the title to uplands, they held it only in trust for the future State. "Upon the admission of California into the Union upon an equal footing with the original States," said the court, "absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation of the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General Government."

63 It does not remain open to question, therefore, that the State of California acquired, by the act of Congress of September 9, 1850, title to the soil under the tide waters of the bay of San Francisco, subject to the paramount right of navigation over the waters, so far as the same may be required by the necessities of commerce with foreign nations or among the several States, the regulation of which remains vested in the United States. In view of the decision of the Supreme Court in the case of Illinois Central Railroad Company *v.* Illinois, *supra*, the right of the State to dispose of such lands, however, does not seem to be as broad as it was declared to be in the case of Webber *v.* Harbor Commissioners; for in Illinois Central Railroad Company *v.* Illinois the court, in speaking of the title of the State of Illinois to the lands under the navigable waters of Lake Michigan, said: "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the creation of wharves, docks, and piers therein, for

64 which purpose the State may grant parcels of the submerged lands, and so long as their disposition is made for such purpose no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce and grants

of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State; but that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interest of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language, sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands
65 under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they can not be placed entirely beyond the direction and control of the State. * * * Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the
66 right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every har-

bor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated."

Under the rule declared in the case last cited there can be no valid objection to the grant by the State of a comparatively small part of the submerged lands of the bay, made, as was the grant to Tichenor under whom the defendant company claims, in aid, to some extent, of commerce, so long at least as the grant is unquestioned by the State and the improvements are made under and subject to the control of the United States, which is the case before us; for the act of California providing for the sale and conveyance to Tichenor of the submerged lands in controversy, and for which the State's patent was thereby authorized, expressly provided that "such patent shall not be issued until said Tichenor, his heirs or assigns, shall have constructed a marine railway or dry dock at said Mission Rock" (Cal. Stat., 1869, 1870, p. 801), and the findings of the court below show that the United States Engineer Department prescribed the line beyond which the defendant company and its predecessors in interest were precluded from filling in the submerged land covered by the grant from the State. A large and valuable part of the city of San Francisco, extending from the present water front to, in some places, Montgomery street, was at the time of and subsequent to the admission of California into the Union a part of the submerged lands of the bay, but has since been filled in by the many hundred grantors under the city and State, who have erected buildings and improvements thereon at costs running into many millions of dollars. All of this was done in aid of commerce, in the upbuilding of a great city upon the bay, and with the encouragement and consent
67 of the General Government. Under such circumstances we regard it as very clear that no court would be justified in holding titles thus secured invalid. Upon the facts appearing, we are of the opinion that the United States is not entitled to recover from the defendant any of the submerged land included in the grant from the State of California to the predecessor in interest of the defendant. We are further of opinion, however, that that grant did not include the two rocks or islands above mentioned, for the reason that neither of them ever passed to the State. They no more constituted submerged land than did the island of Alcatraz, also situated in the bay of San Francisco, upon which the Government has erected and now maintains important fortifications. That island, it is true, is much larger than the larger of the two islands or rocks here in controversy, the island of Alcatraz being about six hundred yards long by about two hundred and sixty yards in breadth, and rising to an elevation of one hundred and thirty-seven feet above the bay. Like the two islands in controversy, however, it is composed almost entirely of rock. (Pacific Coast Pilot, 182.) The relative size, however, of the rocks or islands does not change their legal character. Neither of them is submerged and all alike project above the surface of the bay, and do not and never did constitute any part of the submerged or tide lands which passed to the State. The title acquired by the United States to the rocks and islands in question as successor of the Mexican Republic was not relinquished by the provisions of section 5 of the act of Congress of July 1, 1864 (13 Stats. at Large, 332), which reads as follows:

"SEC. 5. And be it further enacted, That all the right and title of the

United States to the lands within the corporate limits of the city
68 of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the 15th of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of land which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office by the surveyor-general of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys: And provided, That the relinquishment and grant by this act shall in no manner interfere with or prejudice any bona fide claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

The act of July 1, 1864, was in aid and furtherance of the act of Congress of March 3, 1851 (9 Stats. at Large, 631), the purpose of which was, as its title declared, the ascertainment and settlement of private land claims in California. To the board of land commissioners created by that act the city of San Francisco, which had been incorporated in April, 1850, as a city by the State government, presented its claim to four square leagues of land as the successor of the Mex-
69 ican pueblo. Those proceedings resulted in a decree of the circuit court of the United States for the district of California, entered on the 18th of May, 1858, confirming the claim of the city to a tract of land embracing so much of the upper portion of the peninsula which is situated above ordinary high-water mark of 1846 as would contain an area of four square leagues, the tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area designated, subject to certain deductions which it is unnecessary to mention. The confirmation was to San Francisco in trust for the benefit of lot holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue in trust for the benefit of the inhabitants of the city. (San Francisco v. Le Roy, 138 U. S., 656, 665.) Pending those proceedings for the confirmation of the city's claim, to wit, April 15, 1851, its charter of 1850 was repealed and a new charter adopted (Cal. Stats., 1851, 357), and on the 20th day of June, 1855, what is generally known as the Van Ness ordinance was adopted by the city of San Francisco, by which the city relinquished and granted all its right and claim to the land within its corporate limits as defined by its charter of 1851, with certain exceptions, to parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the

time of the introduction of the ordinance into the common council or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that for the purposes contemplated by the ordinance persons should be deemed possessors who held
70 titles to land within those limits by virtue of a grant made by any ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo before the 7th of July, 1846, or by virtue of a grant subsequently made by the authorities, within certain limits of the city, previous to its incorporation by the State, provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the recorder of the county previous to April 3, 1851. The city, among other things, reserved from the grant all the lots which it then occupied or had set apart for public squares, streets, and sites for schoolhouses, city hall, and other buildings belonging to the corporation. In March, 1858, the legislature of the State of California ratified and confirmed that ordinance (Stats. of Cal., 1858, page 52), and by the fifth section of the act of Congress of June 1, 1864, above quoted, the right and title of the United States to the lands claimed within the corporate limits of the charter of 1851 were relinquished and granted to the city and its successors for the uses and purposes specified in the Van Ness ordinance. Those uses and purposes, as will readily be seen from the foregoing statement of them, had no relation whatever to the rocks or islands here in controversy, which were and are far outside of the pueblo grant of lands claimed by and confirmed to the city.

From the views above expressed it results that the judgment must be, and hereby is, reversed, and the cause must be, and hereby is, remanded to the court below with instructions to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, and designated on the offi-
71 cial plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California; and as respects the remainder of the land sued for, that the plaintiff take nothing.

(Endorsed:) Opinion. Filed May 16, 1901. F. D. Monckton, clerk.

72 United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY, A CORPORATION, plaintiff in error, v. THE UNITED STATES OF AMERICA, DEFENDANT in error.	No. 682. Judgment.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and

the same is hereby, reversed, and the cause remanded to the court below with instructions to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, and as respects the remainder of the land sued for that the plaintiff take nothing.

(Endorsed:) Judgment. Filed and entered May 16, 1901. F. D. Monckton, clerk.

73 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, plaintiff in error,
vs.
MISSION ROCK COMPANY (CORPORATION), defendant in error.

Petition for a writ of error.

The United States of America, plaintiff in error in the above-entitled action, feeling itself aggrieved by the decision and judgment of the United States circuit court of appeals, ninth circuit, entered in this cause on the sixteenth day of May, in the year of our Lord one thousand nine hundred and one, does, through and by its attorney, Marshall B. Woodworth, United States attorney in and for the northern district of California, respectfully petition and pray this honorable court for the allowance of a writ of error from said decision and judgment of the circuit court of appeals, ninth circuit, to this court, under and according to the laws of the United States in that behalf made and performed, and that, pending all further proceedings in this court, the decision and judgment of the United States circuit court of appeals, ninth district, be suspended and stayed until the determination of said writ of error by this court; said plaintiff in error prays that a transcript and record of the proceedings in the cause, duly authenticated, may be transmitted to this court from the said United States circuit court of appeals, ninth circuit.

74 Your petitioner and plaintiff in error herewith presents its assignment of errors.

MARSHALL B. WOODWORTH,
United States Attorney in and for the Northern District of California, for Petitioner and Plaintiff in Error.

Order allowing writ of error.

It is hereby ordered that the prayer of said petitioner be allowed, and that said writ of error issue as prayed for.

JOSEPH MCKENNA,
Associate Justice, Supreme Court of the United States.

(Endorsed:) Petition for writ of error and order allowing writ of error.

Service of the within petition for writ of error by copy admitted this 6th day of November, 1901. Page, McCutchen, Harding, and Knight, C. P. attorneys for deft. in error.

No. 682 in U. S. circuit court of appeals for the ninth circuit.

Filed November 6, 1901. F. D. Monckton, clerk.

75 In the United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY (A CORPORATION), plaintiff in error, *vs.* THE UNITED STATES OF AMERICA, DEFENDANT in error. } No. 682.

Assignment of errors.

Now comes the defendant in error, the United States of America, and files its assignment of errors in the above-entitled case, as follows, to wit:

I.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment that the United States was entitled to judgment for the recovery of the possession of the two islands or rocks mentioned in the findings of fact, containing, respectively, .14 of an acre and .01 of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2, section 11, township 2 south, range 5 west, M. D. M., California, and, as respects the remainder of the land sued for, that the United States take nothing.

II.

76 That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment that, upon the findings of fact and conclusions of law, the Mission Rock Company was entitled to judgment against the United States for all of the premises described in the complaint, excepting those portions containing, respectively, .14 of an acre and .01 of an acre, and designated on the official plat in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

III.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment that, upon the findings of fact and conclusions of law, the United States was not entitled to judgment against the Mission Rock Company for all of the lands described in the complaint, excepting as to those portions containing, respectively, .14 of an acre and .01 of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

IV.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the title to that portion of the lands described in the complaint, which was constantly covered by the tidal waters of the bay of San Francisco, remained and was, after the admission of the State of California into the Union, in the State of California, and did not remain and vest in the United States.

V.

77 That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that that portion of the lands described in the complaint, and which is shown by the findings of fact to have been, and to be, below the line of ordinary high-water mark was and is land, the title whereof was and remained after the admission of the State of California into the Union, in the State of California and not in the United States.

VI.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment, holding and adjudging that the title to that portion of the lands described in the complaint which was constantly submerged by the tidal waters of the bay of San Francisco did vest in the State of California on the admission of the State into the Union, and that the Mission Rock Company, the grantee, by mesne conveyances, as shown by the findings of fact, became vested with the title to said lands.

VII.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment, holding and adjudging that the title to that portion of the lands described in the complaint, which by the findings of fact was shown to lie below the line of ordinary high-water mark, vested in the State of California on the admission of the said State into the Union.

VIII.

78 That the United States circuit court of appeals for the ninth circuit erred in holding and adjudging that the Executive order issued on the 13th day of January, 1899, by the President of the United States, ordering that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California, be declared as permanently reserved for naval purposes, comprehended, respectively, .14 of an acre and .01 of an acre, instead of all of the lands described in the complaint.

IX.

That the United States circuit court of appeals for the ninth circuit erred in holding and adjudging that the executive order issued on the 13th

day of January, 1899, by the President of the United States, ordering that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California, be declared to be permanently reserved for naval purposes, did not comprehend and embrace all of the land described in the complaint, containing 14.69 acres.

X.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the executive order issued on the 13th day of January, 1899, by the President of the United States, ordering that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west,
M. D. M., California, be declared to be permanently reserved for
79 naval purposes, did not except more than .14 of an acre and .01
of an acre, respectively, lying above ordinary high-water mark, from the specific acreage of the land sued for.

XI.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that all of the said lands in the complaint described, excepting those portions containing, respectively, .14 of an acre and .01 of an acre, lying above the line of ordinary high-water mark, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2, section 11, township 2 south, range 5 west, M. D. M., California, were not part of the lands belonging to the United States.

XII.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the said lands described in the complaint as lying below ordinary high-water mark were lands in which the title did not remain in the United States, but vested in the State of California on her admission into the Union.

XIII.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the State of California had a right to grant a comparatively small part of the submerged lands of the bay of San Francisco to subserve the purposes of commerce and navigation, or commerce or navigation, or for any purpose whatsoever.

80 XIV.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the State of California had a right to grant any portion of the lands described in the complaint to subserve the purposes of commerce and navigation, or commerce, or navigation, or for any purpose whatsoever.

XV.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the marine railway or dry dock constructed at Mission Rock by one Tichenor was such a purpose, subserving the rights of commerce and navigation, or any right or purpose of commerce and navigation, as to authorize and render legal and valid the act of April 4, 1870, of the legislature of the State of California (Stats. of Cal., 1869–70, p. 801), providing for the sale and conveyance to one Tichenor of the lands described in said complaint, and authorizing the issuance of the patent of the State of California therefor, and which, according to the findings of fact, thereafter issued in accordance with said act of the legislature, upon the express provisions that said Tichenor, his heirs or assigns, should construct a marine railway or dry dock at said Mission Rock, according to the findings of fact, was done.

XVI.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the act of April 4, 1870, of the legislature of the State of California (Stats. of Cal., 1869–70, p. 801),
81 providing for the sale and conveyance to one Tichenor of the lands described in said complaint, and for which the State's patent was thereby authorized, and which, according to the findings of fact thereafter issued, upon the express provision that said Tichenor, his heirs or assigns, should construct a marine railway or dry dock at Mission Rock, which, according to the findings of fact, was done, was valid, and constituted a valid grant by the State of the lands described in said act and in said complaint, excepting those portions containing, respectively, .14 of an acre and .01 of an acre, the same being, respectively, above the line of ordinary high-water mark, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

XVII.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the United States was not entitled to all of the accretions mentioned in the findings of fact (Finding No. IX) attached to and surrounding those portions of land comprehended in the complaint, and held by it to belong to the United States, to wit, containing, respectively, .14 of an acre and .01 of an acre, and lying above the line of ordinary high-water mark, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

XVIII.

That the United States circuit court of appeals, for the ninth circ-
82 cuit, erred in deciding and holding that the United States was only entitled to those portions of the lands described in the complaint, containing, respectively, .14 of an acre and .01 of an acre, lying above the line of ordinary high-water mark, and designated on the offi-

cial plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California, and was not also entitled to, and did not own, all of the accretions mentioned in the findings of fact (Finding No. IX), attached to and surrounding said lands above described, with all of the improvements thereon.

XIX.

That the court erred in deciding and holding that the United States, as the owner of Mission Rock, and the adjacent rock, did not own and be entitled to the recovery and possession, as such owner, of the artificial accretions, containing about four acres, made upon the lands theretofore submerged and covered by the waters of the bay of San Francisco immediately surrounding said rocks, which accretions had become a part of said rocks.

XX.

The court erred in deciding and holding that the United States did not have such a paramount sovereignty in its ownership as to preclude the right of the State of California, or its assigns, from filling in around said rock by accretions, artificial, to the entire deprivation and destruction of the rights of said United States, and to its property in said rocks.

XXI.

83 The court errred in deciding and holding that the United States, as the littoral owner of said islands, did not own the accretions made thereto; and as a riparian owner did not own and have the right to the possession of said accretions.

XXII.

The court erred in deciding and holding that the United States, as the riparian owner, did not have the right of property in and to the lands submerged, immediately surrounding its said islands, and did not own the same after said lands were filled in as aforesaid.

XXIII.

The court erred in deciding and holding that the United States did not have such a sovereignty in its titles to its lands, and to the particular islands in dispute, as to prevent the State of California from doing and performing any act whereby such sovereignty would be destroyed, and to shut off the United States in the exercise of its sovereignty from the navigable waters, and to shut off the United States from all communication with said waters.

XXIV.

The court erred in deciding and holding that the State could and did grant such a title in its submerged lands as to permit its grantee to fill in said lands above high-water mark, when the same surrounded the islands of the United States, or when the same was not adjacent to the shore.

XXV.

The court erred in deciding and holding that the State of California could grant such a title in its submerged lands as to permit its
84 grantee to fill in the same above high-water mark, when the said grantee was and is not the littoral owner or riparian owner.

XXVI.

The court erred in deciding and holding that the State of California could, in 1870, grant a fee in its submerged lands, in contravention of the acts of the legislature, as follows: The act of May 13, 1861 (Stats. of Cal., 1861, p. 335); the act of May 14, 1861 (State of Cal., p. 363); the act of April 27, 1863 (Stats. of Cal., 1863, sections 30 and 31, pp. 591, 601).

XXVII.

The court erred in deciding and holding that the act of the legislature of the State of California of April 4, 1870, heretofore referred to, and the patent following the same to the said Tichenor, was a conveyance in fee, or was more than a license to use said lands for the purpose of a marine railway to be built upon the said islands of the Government, to be used for commerce and navigation, and so as not to interfere with the rights of the United States.

XXVIII.

The court erred in deciding and holding that the acts of the assignees of the State of California, in filling in the submerged lands aforesaid, was not a trespass, and an unlawful act, the consequence of which would result to the title in the said islands, and the benefit, if any, would inure to said title in said islands.

XXIX.

The court erred in deciding and holding that the act of the Gov-
85 ernment engineers, in defining the line beyond which such filling could not be made, gave any rights or title to the assignees of the State of California, or any permission by which they might acquire such rights.

MARSHALL B. WOODWORTH.
United States Attorney.

(Endorsed:) Assignment of errors.

Service of the within assignment of errors by copy admitted this 6th day of November, 1901. Page, McCutchen, Harding & Knight, C. P., attorneys for Mission Rock Co.

No. 682 in U. S. circuit court of appeals for the ninth circuit.

Filed November 6, 1901. F. D. Monckton, clerk.

86 United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY, A CORPORATION, plaintiff in error,
v.
THE UNITED STATES OF AMERICA, DEFENDANT in error. } No. 682.

Certificate of Clerk C. C. A. to transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing eighty-five (85) pages, numbered from one (1) to eighty-five (85), inclusive, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 15th day of November, in the year of our Lord one thousand nine hundred and one.

[SEAL.] F. D. MONCKTON, *Clerk.*

87 UNITED STATES OF AMERICA, ss.

The President of the United States, To the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between the Mission Rock Company (a corporation), plaintiff in error, and The United States of America, defendant in error, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of October, in the year of our Lord one thousand nine hundred and one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

88 *Return to writ error.*

The answer of the judges of the United States circuit court of appeals for the ninth circuit:

As within we are commanded, we certify under the seal of our said circuit court of appeals in a certain schedule to this writ annexed the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

By the court:

[SEAL.] F. D. MONCKTON, *Clerk.*

Due service of a copy of the within writ of error admitted this sixth day of November, 1901.

PAGE, MCCUTCHEN, HARDING & KNIGHT, C. P.,
Attorneys for Defendant in Error.

(Indorsed:) No. 682. In the United States circuit court of appeals for the ninth circuit. The Mission Rock Co. (a corporation) vs. The United States. Writ of error. Filed November 6, 1901. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

89 UNITED STATES OF AMERICA, ss.

To The Mission Rock Company (a corporation), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States this 31st day of October, in the year of our Lord one thousand nine hundred and one.

JOSEPH MCKENNA,
Asso. Justice Supreme Court U. S.

90 On this sixth day of November, in the year of our Lord one thousand nine hundred and one, personally appeared before me, the subscriber, D. D. Jones, and makes affidavit that he delivered a true copy of the within citation to Page, McCutchen, Harding & Knight.

D. D. JONES.

Affirmed and subscribed the 6th day of November, A. D. 1901.

[SEAL.] F. D. MONCKTON.

Due service of a copy of the within citation admitted this sixth day of November, 1901.

PAGE, MCCUTCHEN, HARDING & KNIGHT, C. P.,
Attorneys for Defendant in Error.

(Indorsed:) No. 682. United States circuit court of appeals for the ninth circuit. The Mission Rock Co. (a corporation) v. The United States. Citation. Filed November 6th, 1901. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

(Indorsement on cover:) File No., 18330. U. S. C. C. of appeals, 9th circuit. Term No., 198. The United States, plaintiff in error, vs. The Mission Rock Company. Filed November 25, 1901.

O

23519

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE MISSION ROCK COMPANY. } No. 198.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This was an action in ejectment originally brought by the United States against the California Dry Dock Company to recover the possession of a tract of land lying in the Bay of San Francisco about one-half mile from shore, being a square 800 feet on each side, including the rock or island known as Mission Rock and a small adjacent rock or island, and containing 14.69 acres.

The defendant, the Mission Rock Company, having, pending the action, acquired all the right, title, and interest of the California Dry Dock Company in the premises sued for, was substituted for the original defendant. The circuit court (Beatty, judge) rendered judgment in favor of the United States. (Rec., p. 13.)

19793—03——1

Upon the findings (Rec., pp. 10–13) and judgment, the case was carried on error to the circuit court of appeals, which (Gilbert, Ross, and Morrow, circuit judges) reversed the judgment and remanded the cause with instructions to enter judgment for the plaintiff for the recovery of the possession of the two rocks or islands mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, * * * "*and as respects the remainder of the land sued for that the plaintiff take nothing*" (Opinion, Ross, J., Rec., p. 25; judgment, Rec., p. 34). From this judgment error was prosecuted by the United States to this court.

The findings of the circuit court (Rec., p. 10) are as follows:

FINDINGS. (Rec., p. 10).

I.

The defendant, Mission Rock Company, is and since a date anterior to June 6, 1900, was a corporation organized and existing under the laws of the State of California, and pending the hearing of this cause became, by virtue of a deed of grant, bargain, and sale from The California Dry Dock Company dated June 6, 1900, the owner of all the title and interest of The California Dry Dock Company in and to the premises in controversy, and thereupon entered into and now holds the possession of the same.

On request of the Mission Rock Company and proof of the fact that the said company had acquired the interest of The California Dry

Dock Company in the lands sued for and by consent of the plaintiff, this court made an order substituting the Mission Rock Company for The California Dry Dock Company as defendant, and continuing this action against said Mission Rock Company as defendant.

II.

At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than 20 and less than 40 feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause marked "Exhibit A."

III.

The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called "Mission Rock" had an area of fourteen one-hundredths ($\frac{14}{100}$) of an acre; the other had an area of one one-hundredth ($\frac{1}{100}$) of an acre. These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides to the extent that they were covered and uncovered by the flow and ebb of the tide varied from 10 to 25 feet, depending on their steepness. Both

rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland and surrounded and now surrounds them.

IV.

The lands described in the complaint were not, at the date of the admission of the State of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican governments.

V.

No approved plat of the exterior limits of the city of San Francisco, as provided by the terms of section 5 of the act of July 1, 1864 (13 Stat., 332), has been filed or rendered to the General Land Office of the United States, or of the State of California. The lands sued for in this action are within such exterior limits.

VI.

On the 13th day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

"EXECUTIVE MANSION, *January 13, 1899.*

"It is hereby ordered that Mission Island and the small island southeast thereof, designated on the official plat on file in the General

Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

"WILLIAM MCKINLEY."

VII.

On the —— day of March, 1864, the United States surveyor-general for the State of California extended the public surveyors so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

VIII.

On April 4, 1870, the governor of the State of California approved an act of the legislature of the State entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor," which act was printed in the Statutes of California for the years 1870–71, at page 801, is hereby referred to and made part hereof.

The lands therein described include the lands sued for in this action. On the 11th day of July, 1872, the State of California, in conformity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

After execution of the said patent the said Tichenor executed and delivered a deed of grant, bargain, and sale, dated May 1, 1878, purporting to convey the said lands to the California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named corporation has not since said date conveyed to any person or corporation the said lands.

IX.

The California Dry Dock Company, upon going into possession of said lands so conveyed undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about 4 acres, upon which extensive warehouses were built by it, and wharves erected for the accommodation of shipping.

Since the issuance of the State patent hereinbefore referred to, the patentee thereof up to May 1, 1878, The California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present time, have been in continuous and uninterrupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof.

23522

X.

On April 7, 1900, Col. George H. Mendell, then in charge of the Corps of Engineers of the United States Army on the Pacific coast, caused to be served on the California Dry Dock Company the following notice:

"UNITED STATES ENGINEER OFFICE,
"No. 533 KEARNY STREET,
"*San Francisco, Cal., April 7, 1890* (1900).

"Captain OLIVER ELDRIDGE,
"*President California Dry Dock Company,*
"*303 California Street, San Francisco, Cal.*

"SIR: Under the provisions of section 12 of the river and harbor act of August 11, 1888 (a copy of which is enclosed), a board of engineer officers was appointed to establish the harbor lines of San Francisco Harbor and adjacent waters. There is transmitted herewith, for your information, a map, upon which are shown the limiting lines of wharves and the line beyond which no deposits shall hereafter be made, at Mission Rock, as established by the board and approved by the Secretary of War March 24, 1890.

"Very respectfully,
"G. H. MENDELL,
"*Colonel, Corps of Engineers.*"

The limits referred to in the above letter, and delineated on the map, are in effect the limits of "Mission Rock" as improved at that time.

SUPPLEMENTAL FINDING. (Rec., p. 13.)

The title of the United States, as successor of the Mexican Republic, under the treaty of Guadalupe-Hidalgo, to the land in controversy, has not since been divested by patent or other conveyance, and the title thereto is still in the United States, unless the same passed to the State of California by virtue of the admission of the State under the act of Congress, or unless the United States relinquished title thereto under subsequent acts of Congress.

ARGUMENT.

I.

Upon the acquisition of California from Mexico, under the treaty of Guadalupe-Hidalgo (May 30, 1848; 9 Stat., 922), all the Territory then belonging to Mexico became the property of the United States, both the tide lands and the upland. Among other considerations, the United States agreed to pay Mexico $15,000,000 for this land (art. 12) and to assume and pay certain claims outstanding against Mexico (arts. 13, 14, 15).

From the lands thus acquired must, of course, be excepted the lands which Mexico, prior to the treaty, had granted or in any way disposed of. Subject to this exception, the United States became the owner of all the land in California, both the fast land and the submerged land. (*San Francisco* v. *Le Roy*, 138 U. S., 656, 671; *Knight* v. *U. S. Land Association*, 142 U. S, 161, 183.)

The tide or submerged lands the United States took in trust for the future State of California (*San Francisco* v. *Le Roy*, 138 U. S., 656, 671; *Knight* v. *U. S. Land Association*, 142 U. S., 161, 183). All the rest it held in absolute ownership.

The tide or submerged lands which the United States held in trust for the future State, and which, upon the admission of California to the United States, became in a sense the property of California, to be held and used in trust for the benefit of the people, have been repeatedly described by this court.

In *San Francisco* v. *Le Roy* (138 U. S., 656), the court, speaking by Mr. Justice Field, said (p. 671):

> The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide water flowed so continuously as to prevent their use and occupation. To render lands tide lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which upland is applied.

This definition was quoted with approval in *Knight* v. *U. S. Land Association* (142 U. S., 161, 186).

In all the cases I have read the lands which, under this doctrine, went to the original States when the Revolution took place, and to the subsequent States upon their admission to the Union, is *submerged* land—land under water, not land above water. The control

over the navigable waters included the ownership, in trust for the people, of the soils covered by such water.

In *Martin* v. *Waddell* (16 Peters, 367) the court speaks of the States' absolute right "to all their navigable waters and the soils under them" (p. 410).

In *Weber* v. *Board of Harbor Commissioners* (18 Wall., 57), a California case, Mr. Justice Field, speaking for the court, said (p. 65):

> Although the title to the soil under the tide waters of the bay [of San Francisco] was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over, *all soils under the tide waters* within her limits passed to the State, etc.

In *Illinois Central Railroad* v. *Illinois* (146 U. S., 387) the ownership by the State, in trust for the people, "over lands covered by tide waters" is discussed (p. 435). In another place the court speaks of such lands as "lands under navigable waters" (p. 452).

In *Shively* v. *Bowlby* (152 U. S., 1) Mr. Justice Gray, in stating his conclusions (p. 57), speaks of "lands under tide waters," and "lands flowed by the tide;" and again "in the tide waters, and lands under them;" and further on, "in navigable waters and in the soil under them."

II.

Conceding that, upon the admission of California into the Union, the State took and has since held the

23524

ownership of the tide lands, or the submerged lands, or the navigable waters with the soils under them, to be used in trust for the people in the furtherance of navigation and commerce, the island or islands known as Mission Rock remained the property of the United States, because they never had been nor are they now tide land, or submerged land, or soil under navigable waters.

> At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and *projecting above the plane of ordinary high water in the bay of San Francisco, the larger of which rose to a height of more than 20 and less than 40 feet above such high water.* Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged, and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause, marked "Exhibit A." (Finding II.)
>
> The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called "Mission Rock" had an area of fourteen one-hundredths ($\frac{14}{100}$) of an acre; the other had an area of one one-hundredth ($\frac{1}{100}$) of an acre. *These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides, to the extent that they were covered and uncovered by the flow and ebb of the tide, varied from 10 to 25 feet, depending on their steepness.* Both rocks were barren,

> without soil or water, and were of no value for purposes agricultural or mineral. *They lay at a distance of about half of a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland, and surrounded and now surrounds them.* (Finding III.)

The circuit court of appeals, which sat at San Francisco, says (Rec., p. 31):

> They (the rocks or islands mentioned) no more constitute submerged land than did the Island of Alcatraz, also situated in the Bay of San Francisco, upon which the Government has erected and now maintains important fortifications. That island, it is true, is much larger than the larger of the two islands or rocks here in controversy, the island of Alcatraz being about 600 yards long by about 260 yards in breadth, and rising to an elevation of 137 feet above the bay. Like the two islands in controversy, however, it is composed almost entirely of rock (Pacific Coast Pilot, 182). The relative size, however, of the rocks or islands does not change their legal character. Neither of them is submerged and all alike project above the surface of the bay, and do not and never did constitute any part of the submerged or tide lands which passed to the State.

In this connection it is well to point out that, as stated in the seventh finding (Rec., p. 11):

> On the —— day of March, 1864, the United States surveyor-general for the State of Cali-

fornia extended the public survey so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

The purchase of over 14 acres of submerged land surrounding these rocks or islands shows conclusively that the rocks or islands were not submerged land. The submerged land was purchased because of the location of the islands. Without the islands, the soil under the navigable waters of the Bay of San Francisco a half mile from shore would have been worthless. The submerged land was bought upon the condition that a marine railway and dry dock should be built at Mission Rock. This of itself was sufficient to show the possible use and value of this island, not as submerged land, but as "fast land," land above water, permanently fixed, and capable of a valuable commercial use. If valuable to a private individual or corporation for improvement as a site for docks and warehouses, Mission Rock was equally valuable to the United States as a site for naval, military, or commercial purposes.

Opposing counsel liken these islands to rocks embedded in the shore, which by chance lift their caps sufficiently high to be above ordinary high tide, and assert that the State might destroy them as obstructions or turn them to use as improvements to navigation. If a rocky promontory of the character of Mission Island extended into a navigable bay, the State would find some difficulty in destroying it as an obstruction without first compensating the owner for the value

of his property. If by some operation of nature, the promontory were separated from the land, so that water flowed between it and the mainland, and it became an island, such as Mission Island, it would still remain the property of the riparian owner with all the rights appurtenant to such possession.

In the case of *Commonwealth* v. *Shaw* (14 S. & R., 9 (1826), it was held that a rock just below the Fairmount Dam in the Schuylkill River, which before the construction of that dam had been a part of the mainland but as a result of the erection of the dam had become detached, surrounded by water, and dry only at low tide and a few hours before and after, did not, because of that fact, become common property upon which the people generally had a right to stand and fish, but remained the property of the owner of the mainland, from which the rock had been detached.

But Mission Island and the adjoining island are not rocks in the sense that they are huge, detached pieces of stone lying embedded in the soil of San Francisco Bay. They are rocks only in the sense that the rocky summit of a mountain, a hill, or any elevation of ground may be said to be a rock. Mission Island is the summit of a rocky elevation which at that point rises some 40 feet above high-water mark. It differs in no respect from Alcatraz or the other islands, except in size. The rocky ground surrounding Mission Island slopes away gradually to the navigable part of the bay. The distinction between a natural formation of this character, peculiarly designed for use as an island

for military, naval, or commercial purposes, and a big rock embedded in the soil of a bay, fit for nothing except to be blown up, is broad and obvious.

III.

But it is insisted that upon the admission of California, all property "above and below high water," not reserved by the United States in the act of admission, passed to the State. This is novel doctrine. It is based on the contention that if there was any land reserved under the act, it was only "public lands," meaning thereby land "subject to sale or other disposal under general laws"—citing *Newhall* v. *Sanger* (92 U. S., 761, 763). Carried to its logical conclusion, this doctrine would strip the United States of all its lands except such as were open for preemption and sale under general laws. Military reservations, military posts, forts, prisons, parks, post-offices, public buildings, public sites, and other land belonging to the United States but reserved or set aside for public purposes and therefore not open for preemption or sale under general laws, would pass to the State.

In *Leavenworth Railroad Co.* v. *United States* (92 U. S., 733) it was held that land set aside or reserved for an Indian reservation was not "public land" within the meaning of a railroad grant, the court relying upon the doctrine in *Wilcox* v. *Jackson* (13 Pet., 498), and saying (p. 745):

> We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox* v. *Jackson* (13 Pet., 498)

> the President, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but this court held that the act did not apply, and then added, "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it."

All the authorities cited by opposing counsel with respect to the meaning of the words "public lands" only show that where Congress has provided for a grant of "public lands" to a railroad, or has thrown open "public lands" to preemption or sale, the phrase "public lands" does not include land which has been in any way reserved or appropriated by the Government to a use which naturally and reasonably takes it outside of land open to preemption or sale under general laws.

I have already referred to what the court held in the case of *Leavenworth Railroad Co.* v. *United States* (92 U. S., 733).

In *Newhall* v. *Sanger* (92 U. S., 761) it was held that lands within the boundary of an alleged Mexican or Spanish grant, which was *sub judice*, were not embraced within a grant made to a railroad company so as to be

subject to withdrawal. Said the court, speaking by Mr. Justice Davis (p. 762):

> The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present term, in *Leavenworth, etc., Railroad Co.* v. *United States* (*supra*, p. 733). We held that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves; and we confined a grant of every alternate section of "land" to such whereto complete title was absolutely vested in the United States. The acts which govern this case are more explicit and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact, that to them alone could the order withdrawing lands from preemption, private entry, and sale, apply.

So in the case of *Doolan* v. *Carr* (125 U. S., 618) the court held that land within the limit of a valid Mexican grant did not pass to the Pacific Railroad as "public lands" within the meaning of the act of Congress making the grant to that corporation.

The case of *Mann* v. *Tacoma Land Company* (153 U. S., 273) properly holds that scrip or certificates for public land which an act of Congress provided might be located upon "unoccupied and unappropriated public lands," could not be located upon tide lands. Tide

lands are not public lands in any sense, because they pass to the States; they are not the property of the United States.

I concede that the term "public lands," as used in these acts of Congress making grants of public lands, does not include lands which have been reserved for public purposes. But I submit that the act admitting California into the Union never intended, by making use of the term "public lands," to reserve for the United States only lands open to preemption or sale, and therefore released or granted to the State of California all other lands—that is, lands not open to public sale but reserved by the United States for some public use.

The act provides in the third section (9 Stat., 452) that the State of California is admitted upon the express condition that the people of the State "shall never interfere with the primary disposal of *the public lands within its limits*, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description upon *the public domain of the United States*."

The title of the United States to, and right to dispose of, the public lands shall not be impaired or questioned, and no tax of any kind shall be laid upon "the public domain of the United States." This condition protects *all* the land belonging to the United States and constituting their public domain. It covers both the public lands subject to disposition under gen-

eral law, and that portion of the public domain reserved for national use and not open to disposition under general laws. No tax or assessment is to be laid upon any land of the United States whether held for public use or for disposition; and there shall never be any interference with the disposal of the public lands open to disposition under general law, either by questioning the title of the United States or their right to dispose of such lands.

That parts of the public domain may be reserved from preemption or sale and set apart for public uses, see the opinion of the court (Field, J.) in *Grisar* v. *McDowell* (6 Wall., 363, 381). This was a California case involving the title to lands claimed to be within the pueblo limits of San Francisco, but reserved from preemption or sale and set aside for military and other public uses by orders of President Fillmore.

IV.

That the title to Mission Rock and the adjacent island never passed to the State of California and still remains in the United States, is conclusively shown by the fact that, by the act under which the defendant claims, the State of California never attempted to convey any title to it. The act (see appendix) is entitled "An act to provide for *the sale and conveyance of certain submerged lands* in the city and county of San Francisco to Henry B. Tichenor." It attempts to convey, not Mission Rock, but only the submerged land inclosed in a square measuring 800 feet on each side, surrounding Mission Rock. The island or islands included in this

square were, by clear implication, excluded from the proposed grant. This appears from a careful reading of the act. Tichenor, the grantee, is authorized to have a survey and map made, at his own expense, by the city and county surveyor of San Francisco, "*of the lands belonging to the State*," situated in said city and county and included within certain boundaries which are given. These boundaries defined a square 800 feet on each side, located in the Bay of San Francisco, a point on one side of which is 3,570 feet southeasterly from the southerly corner of Brannan and Second streets in San Francisco, "said tract of land being a square, including the rock known as Mission Rock." This survey and map is to be made by Tichenor in order *to ascertain the quantity and location "of the lands belonging to the State*," which lie within the described square. "Upon the approval of such survey by the surveyor-general, and the payment by said Tichenor to the State treasury, of the value of all the lands within said described boundaries *which shall be shown by such survey and map to lie below ordinary high-water mark*, at such rate as shall be assessed by the board of State tide commissioners per acre, * * * a patent *for said lands* shall be issued to said Tichenor, his heirs and assigns." The lands to be patented are obviously the lands to be surveyed and paid for. If the State had claimed ownership of Mission Rock and had attempted to convey it, there would have been no necessity for a survey to ascertain the quantity of submerged land within the square

described. The description of the square would have sufficed to ascertain both the quantity of land to be conveyed and its location.

An examination of the patent (printed in the appendix) confirms this. The patent contains a statement of the amount of submerged land included in the square, which is fourteen and thirty-five one-hundredths acres. The square itself contains fourteen and sixty-nine one-hundredths acres. The difference is thirty-four one-hundredths of an acre, which represents the area of Mission Rock and the adjoining island as it existed, above water, at the time of the survey. The patent is so drafted that it may be read as a conveyance of the square, including Mission Rock or excluding Mission Rock, the patent being for "the following-described lands" (describing them), "said tract of land being a square, including the rock known as Mission Rock, *and containing fourteen and thirty-five one-hundredths acres exclusive of said Rock.*" If the purpose had been to convey Mission Rock, the concluding portion would have read: "Said tract of land being a square, including the rock known as Mission Rock, and containing fourteen and sixty-nine one-hundredths acres.

But however this patent may read, it can not extend the grant made by the legislature, which is defined by the act. Under the act nothing but the submerged land, which was ascertained by the survey to contain fourteen and thirty-five one-hundredths acres, was paid for and conveyed. There is no ambiguity in the act;

but if there were, the doubt would be resolved against the grantee. All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. (*Dubuque, etc., R. R. Co.* v. *Litchfield*, 23 Howard, 66, quoted with approval in *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S., 733, 740; *Rice* v. *Railroad Co.*, 1 Black, 380; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.)

Or, as Mr. Justice Field puts it in the *Delaware Railroad Tax Case* (18 Wall., 206, 225):

> All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule.

V.

But it may be said, if California did not claim the ownership of Mission Rock, why was the proviso inserted that the patent for the submerged lands surrounding Mission Rock should not be issued "until said Tichenor, his heirs or assigns, shall have constructed a marine railway or dry dock at said Mission Rock?" The answer is, that the State of California held the submerged lands in the Bay of San Francisco in trust for the public and could not convey them except for use in aid of navigation and commerce. It held no absolute ownership; it could convey no absolute and

unqualified title. These submerged lands, surrounding an island in the Bay of San Francisco half a mile from shore and separated from it by navigable waters, could not be conveyed or used except in connection with the island which they surrounded. (*Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 435, 452.) The act, therefore, required the use of Mission Rock, the erection of a marine railway or dry dock at Mission Rock, and this required the grantee of the submerged land to obtain a title from the United States to Mission Rock, or the right or privilege of using it as a site for a marine railway or dry dock.

I submit that this provision requiring as a prerequisite to the issuing of the patent that a marine railway or dry dock be constructed at Mission Rock, required also, in order to validate the grant, that the grantee secure from the United States the title to Mission Rock or the right to use it as a site for a marine railway or dry dock. Mission Rock was the center and foundation stone, not simply of the grant, but of the improvement it was intended to effectuate. Without Mission Rock, and the riparian or littoral rights appurtenant to it, the grant failed; and without Mission Rock the improvements contemplated and required could neither be erected or maintained. The United States, as the owner of Mission Rock, had the right, *a property right*, to use the navigable waters surrounding the island, and for that purpose to fill in and reclaim the overflowed lands, and erect wharves, piers, and docks extending to whatever point it might deem advisable in order to

reach the desired depth of navigability. If the island had belonged to a private individual, that individual would have had the right to fill in the shallow water surrounding the island and erect docks, piers, and wharves extending to the point of navigability, subject of course to the power of the State and the paramount authority of the United States to define the harbor or dock lines. The right by the grantee of the State to reclaim the submerged lands surrounding Mission Rock being subordinate to that of the United States as the owner of the island, no title as against the United States ever passed by the patent or the grant on which it was based.

VI.

But it may be insisted, upon the authority of *Shively* v. *Bowlby* (152 U. S., 1), that, the ownership of tide or submerged lands being in the State, the State may convey such lands to a person other than the owner of the upland bordering on the tide lands; and, therefore, California had a right to convey the submerged lands to a private person although the United States owned the island. I deny that the State of California had any such unqualified ownership over the submerged lands of San Francisco Bay. It held these lands in trust for the public. It could only convey them to be used for public purposes, and the only public purposes for which these lands could be used was a purpose which required the ownership and use of Mission Rock. The State therefore had no power to convey the lands to be held distinct from Mission Rock and in opposition to the title of the United States to one of its islands.

The court will observe that the title to tide lands derived from the State of Oregon, which was upheld by this court in *Shively* v. *Bowlby* (152 U. S., 1, 53), was a title obtained only after these tide lands had been offered to the owner of the abutting upland and he had rejected the opportunity of acquiring and improving them (p. 53). The Oregon act provided that the owner of any land abutting or fronting upon, or bounded by the shore of any tide waters, should have a right to purchase the lands belonging to the State in front thereof; and that, if he should not do so within three years from the date of the act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase.

This was a recognition of the primary rights of the riparian or littoral owner, and of the qualified power of the State over tide lands. It was the duty of the State to look after the improvement of the shores of its navigable waters, and when it had offered to the riparian proprietor the right to improve the tide lands in front of his premises, and he refused, it was just and proper for the State to convey the tide lands to one who would improve them.

In *Stockham* v. *Browning*, 18 New Jersey Eq., 390 (1867), it is stated (p. 395):

> By the common law, as it existed in New Jersey before 1851, the owners of lands on the margin of tide waters had certain rights and privileges to the water, and in the shore in front

> of his lands, although the title was in the State. By the statute known as the wharf act, approved March 18, 1851, *the right to reclaim the shore* in front of his lands, and appropriate them to his own use, was vested in the shore owner.

Upon the point that, under the laws of New York, the power to convey lands under navigable waters only authorizes a conveyance by the State to the owners of the adjoining upland, the right or privilege to apply for and receive the conveyance from the State being *appurtenant to the upland* and not severable from such ownership, see *Blakslee Mfg. Co.* v. *Blakslee's Sons Iron Works*, 129 N. Y., 155 (1891; Andrews, J.).

VII.

In *Shively* v. *Bowlby* (152 U. S., 1) the court states (p. 48) that it is now well settled that "the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition" (citing a number of cases), and then lays down this proposition (p. 48):

> We can not doubt, therefore, that Congress has the power to make grants of land below high-water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or *to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations* and among the several States, *or to carry out other public*

> *purposes* appropriate to the objects for which the United States hold the territory.

It is clear, therefore, that before California was admitted into the Union, the United States might have granted Mission Rock, and, along with it, the right to use the submerged land and the navigable waters covering it, which surrounded the island. It might have granted Mission Rock and the submerged land about it for use for the purposes set out in the California act relied on in this case. But the United States preferred to reserve Mission Rock for national uses. I submit that when the United States reserved Mission Rock for national uses, it also reserved the right to use the surrounding navigable waters and submerged land, for without them no national use could be made of the island. The title of the United States to Mission Rock was absolute and unqualified, and the authority of the United States over the surrounding navigable waters and submerged land was supreme, the right of the State in the interests of navigation and commerce being subordinate to that of the United States. (*United States* v. *Bellingham Bay Boom Co.*, 176 U. S., 211, 215.) Is it possible, that under this subordinate right, the State of California could deprive the United States both of the ownership of this valuable island and of the use of the navigable waters surrounding it?

In the case of *Scranton* v. *Wheeler* (179 U. S., 141), Mr. Justice Harlan, speaking for the court, said (p. 163):

> Whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights

> which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner.

I submit that here is a case where both justice and reason require that the right of the United States, as proprietor and as sovereign, in the submerged land and the navigable waters which surround one of its islands, should be asserted and maintained. Of what use to the nation is an island in a navigable bay without the use of the shores of the island and of the waters washing them? Is it possible that, owing to our divided sovereignty, the United States may own a valuable island in a great bay, and yet be utterly deprived of its use through a grant by a State legislature of the submerged lands surrounding it? If the State can grant a valid title to the land under navigable waters surrounding an island reserved by the nation as a site for military, naval, or commercial purposes, so that a separate, independent, distinct, and repugnant use of the submerged land may be made in utter disregard of the rights of the Government to the island, a wall may be built up between the island and the bay and access to the outside world completely cut off.

In many cases this court has held that a riparian owner has a right of access to the navigable waters by which his property is bounded. The owner of land

bounded by a river or bay, if denied direct access to the water, may reach it by another way; and he has egress by land to any point he may desire to reach. Not so with the owner of an island. His only means of communicating with the outside world is by the water surrounding him. If the submerged land surrounding him can be sold and filled in, he can be as thoroughly immured as if he were walled up in a dungeon.

VIII.

The United States had the absolute and unqualified ownership of Mission Island. I say unqualified because its title was not conditioned by any public use or trust, as was the State's title to the submerged land. The United States might have sold Mission Island to any individual and conveyed an absolute title. What would this absolute title to Mission Island have included? To determine this, the nature and location of the island must be considered. It was situated in the bay of San Francisco, half a mile from the shore, surrounded by navigable waters. It was not susceptible of cultivation. It contained no mineral except the rock of which it was composed. It was valuable only for use for war, naval, or commercial purposes, as a site for a fort, a coaling station, warehouses and docks, etc. To be used for any of these purposes it was necessary that access should be had from the island to the navigable waters surrounding it; and for this purpose that the contiguous submerged land should be filled up and docks and wharves constructed. This

right of access was a property right incident to the ownership of the island. If the United States had conveyed the island to a private person or corporation, that private person or corporation would have taken with the land this right of access to the navigable water. And whatever right the State held in the tide lands or submerged lands surrounding the island was subordinate and subservient to this right which went with the upland.

In *Dutton* v. *Strong*, 1 Black., 1 (1861; Clifford, J.), it was held in a case coming from Wisconsin, that a riparian proprietor on Lake Michigan has the right to construct a pier for his own exclusive use, the court (bottom p. 31, top p. 32) saying:

> Wharves, quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time.

In the case of *Weber* v. *Board of Harbor Commissioners*, 18 Wall., 57 (1873; Field, J.), while the court upheld the title of the State of California to the soil under the navigable waters of the bay of San Francisco (a doctrine modified in the case of *Illinois Central Railroad* v. *Illinois* (146 U. S., 387), so as to limit the State's ownership to one in trust for certain public uses) the

court explicitly recognized (p. 65) the correctness of the rule laid down in *Yates* v. *Milwaukee* (10 Wall. 497), in which Mr. Justice Miller, speaking for the court, said (p. 504):

> But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. Citing *Dutton* v. *Strong*, 1 Black, 25; *Railroad Company* v. *Schurmeir*, 7 Wall., 272.

Weber's case was distinguished, the court pointing out that he was not the proprietor of any land bordering on the shore of the sea, his land being situated nearly half a mile from what was the shore of the Bay of San Francisco at the time California was admitted into the Union, and over it the water at the lowest tide then flowed at a depth sufficient to float vessels of ordinary size. The inference is that if Weber had been a riparian proprietor, as he would have been if he had owned land bordering on the bay, such as Mission Rock, he would have been entitled to riparian or littoral rights incidental to the ownership of such land.

In the case of *Lake Superior Land Company* v. *Emerson*, 38 Minn., 406 (1888), it was held that the title

to the soil under the water below low-water mark in Lake Superior being in the State, the former owner of the upland abutting on the lake could not make a separate conveyance of the submerged land adjacent thereto. The only rights he had beyond low-water mark were certain riparian rights incident to the land bordering upon the lake, and these he could not sever and transfer.

In the case of *Hanford* v. *St. Paul and Duluth R. R. Company* (43 Minn., 104), this doctrine was modified, the court holding that, in certain cases, the right of the riparian proprietor to reclaim and occupy the submerged lands, although originally incident to the riparian estate, may be separated therefrom and transferred to another. At the same time the court said (bottom p. 111), "*We do not affirm that all riparian rights are thus severable. Some of them, from the very nature of things, may be incapable of separate existence.*" Following this the court says (p. 112):

> It is established beyond question in this State, and in other States as well, that the proprietor of the riparian lands may make such improvements. Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and *exclusive* right to construct and maintain suitable landings, piers, and wharves into the water, and up to the point of navigability, for his own private use and benefit (citing many cases). And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be

reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed. *Union Depot, etc.*, v. *Brunswick*, 31 Minn., 297; *Clement* v. *Burns*, 43 N. H., 609; *Bell* v. *Gough*, 23 N. J. L., 624; *Providence Steam Engine Co.* v. *Providence Steamship Company*, 12 R. I., 348, 363.

Again (p. 114):

> This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises—the *right* itself to reclaim, improve, or occupy—is a *property* right, vested in him, and recognized and protected in the law as property. He can not be deprived of it without due process of law. It can not be taken from him, and devoted to public use, without compensation.

Again (p. 116):

> In some jurisdictions it is considered that the adjacent riparian owner actually acquires title to the lands improved and reclaimed from the water, although the title was before in the State in actual proprietorship (as in New Jersey); and that he may then convey the reclaimed premises to persons having no interest in the upland. See *New Jersey Zinc and Iron Co.* v. *Morris Canal Co.*, 44 N. J. Eq., 398; *Bell* v. *Gough*, 23 N. J. L., 624; *Goodsell* v. *Lawson*, 42 Md., 348, 362; *Nichols* v. *Lewis*, 15 Conn., 137; *Clement* v. *Burns*, 43 N. H., 609.

In the recent case of *Scranton* v. *Wheeler*, 179 U. S., 141 (1900), the court, Mr. Justice Harlan delivering

the opinion, held that the United States is not required to compensate an owner of land fronting on a public navigable river when his right of access to the navigable portion of the stream is permanently obstructed by a pier erected in the river away from the shore line under authority of Congress for the purpose of improving navigation. The pier in question was erected in Sault Ste. Marie Canal, in Michigan. The suit was one in ejectment, the owner claiming property in the submerged land on which the pier was built. As the case came from the supreme court of Michigan, and that court sustained the propriety of the form of action, the Supreme Court of the United States did not pass upon this question.

Mr. Justice Shiras, with whom concurred Mr. Justice Gray and Mr. Justice Peckham, dissented, insisting, after an elaborate review of the authorities (to which I refer the court), that the right of access to the navigable portions of a stream is one of the incidents of ownership of abutting land; that such right is property and valuable as such, and that the United States, under its incidental power arising out of its jurisdiction over interstate commerce, can not destroy such right of access without making compensation (p. 183).

The court insisted that the right of access to the navigable portion of a stream is subordinate to the power of the General Government to cut off all access by improving the stream; on the other hand, the minority of the court insisted that the right of property is not subordinate to the right to improve the river. The river

can be improved only after compensating the riparian owner for the injury to the property taken by destroying the right of access.

IX.

The improvements made at Mission Rock were of such character that they necessarily became, when made, a part of the island itself, impossible to be separated, and therefore the property of the owner of the island. The right of the United States to recover the island consequently carries with it the right to recover the property attached to and made a part of the island. To recover what once constituted the island is not to recover the island, and it is the island alone which is of value to the United States. The ownership of an island is the ownership of a body of land bounded by shores and washed by waters. Along with the island goes the legal right to use the shores and surrounding water in connection with the island. This island (or islands) lay at a distance of about half a mile from the shore line of the bay upon which the city of San Francisco fronted. "Navigable water divided, and still divides, the lands sued for from the mainland and surrounded and now surround them." (Finding II.) The ownership of an island is not only the ownership of land, but of the shores of the land washed by water. If permanent deposits are made against these shores, changing and extending them, pushing them farther out into the water, are the new shores any less the property of the owner of the island than the old shores?

In the case of *Ledyard* v. *Ten Eyck*, 36 Barb., 102 (1862), was involved the title to a fourth of an acre of made land at the end of Cazenovia Lake, a non-navigable body of water. In the construction of a public improvement this land was filled in by the State. On one side it was claimed that it belonged to the State; on the other to the riparian owner on two grounds: first, that the body of water was non-navigable and the title of the riparian owner extended *ad medium filum aquæ;* and, second, that if the lake were navigable, and the title to the land was reserved by the State, the State would take as trustee, both for the public and for the riparian owner. The court said (p. 126):

> The State then is trustee for the public of the land under water in navigable lakes and rivers, so as to protect navigation and prevent hindrances or obstructions; on the other hand she declares herself *trustee for the riparian proprietor*, and that grants are to be made to him alone, and that they will be made not only for purposes of commerce, but when proper for the beneficial enjoyment of his adjacent lands. Then when the proper and constituted authorities of the State proceeded to deepen the outlet of the lake, and deposited the stones and earth that were removed, in the shallow water in front of and adjacent to the defendant's premises, it was a visible and public declaration that this portion of the lake could no longer be used for navigation. The defendant entered into possession, and the trusteeship of the State, both for the public and the riparian proprietor, was

> virtually at an end. It is true that no formal grant was made to the defendant. *But the land became eminently proper, and not only proper but necessary,* for the beneficial enjoyment of his adjacent premises.

Nichols v. *Lewis* (15 Conn., 137) was an action of ejectment for a parcel of land in Bridgeport, lying west of the Pequonnuck River. The dispute arose out of a description in a will, which bequeathed a parcel of land the eastern boundary of which was described as "east on the harbor at the foot of the bank." There was a steep bank on the west side of the harbor about 10 feet high. From the foot of that bank, eastwardly, the land gradually sloped away until it met the channel of the Pequonnuck River, which was the channel of the harbor. Much of this flat land was covered by all the tides of the sea; and the high spring tides extended to the foot of the bank (p. 138).

Before the institution of the suit, the defendant had filled up a portion of the mud flats between the foot of the bank and the channel of the harbor, claiming title, and that he had a right to do so, as riparian proprietor.

The court held that the plaintiff, as the owner of the low ground from the foot of the bank to the water, had a right to recover the made land, *including that once under water which was filled in by the defendant,* saying (Williams, C. J., p. 143):

> The defendant further claims, that for that part of the land filled up in the flats, the plaintiff can have no right to recover; and he says, the legal title is in the State, and not in the

plaintiffs; and if the plaintiffs have a right, this action will not lie.

As to the first objection, that the land between high and low water mark belongs to the public, this has not been denied. Nor has it been denied, that the adjoining proprietor may fill it up, or reclaim it, for the purpose of erecting wharves, not impeding navigation. The defendant, however, insists that when done, the plaintiffs are not the owners of the soil, but the State is owner. Now, although the State *prima facie* is owner of the shore on the seacoast, yet, we think, that if a wharf is legally erected thereon, it can not be maintained, that the freehold is not in the hands of the pr prietor. The law which permits him to build a wharf there, not injurious to the public interest, surely does not consider him as without interest in the soil; and wherever there is an interest in the soil this action will lie, as in the case of a boilery (*Smith* v. ———, 1 Lev., 114), or a fishery (*The King* v. *Old Alresford*, 3 Term Rep., 358). And if this action can not be supported, he is left remediless as it respects an insolvent disseizor. We think the title must be in him, subject to the right of the public to abate it, if it prove a nuisance.

The defendant further claims, that however it might be, had the plaintiffs filled up this flat, yet, as the defendant has done it, the plaintiffs can claim no right to it. Now, if the plaintiffs, as adjoining proprietors, were the individuals who alone had the right to do this, and the defendant has done it, and by means of it, he,

> if permitted to enjoy it fifteen years, would gain a complete title against the plaintiffs, *he can not, we think, complain, if the plaintiffs are allowed to treat his acts as done for them; as if a man builds on another's land, the building belongs to the owner of the land; and if the defendant chooses to put his wharf on property which the plaintiff alone can appropriate in that manner, we think the same principle will apply.*

It was also contended that an action in ejectment would not lie for the recovery of the land because the right of the plaintiff was a mere franchise, but the court held: "But the rule now is, that where the property is tangible, and an entry can be made, and possession can be delivered to the sheriff, this action will lie. * * * Here, the property is tangible; and an entry may be made, and possession given" (p. 144).

X.

It is stated in the third finding that in 1850, when California was admitted into the Union, Mission Rock had an area above high-water mark of fourteen one-hundredths of an acre, and the adjacent rock or island an area of one one-hundredth of an acre.

The survey made by Tichenor, the grantee of the State, in 1870 showed there was at that time fourteen and thirty-five one-hundredths acres of submerged land "below ordinary high-water mark" contained in the square, 800 feet on each side, which contained Mission Rock and the adjacent island. The entire square contained fourteen and sixty-nine one-hundredths acres. This left thirty-four one-hundredths

acres as the area existing at that time above ordinary high-water mark, as shown by the patent and the survey upon which it was based.

It is now conceded that by depositing many thousand tons of rock on the submerged land under the shallow water around and contiguous to Mission Rock and the adjacent island, the area has been increased to about 4 acres. It seems from one of the exhibits that this rock was brought to the island in ships as ballast.

The United States is entitled to recover the entire area claimed by the defendant company, that is, the fourteen and sixty-nine one-hundredths acres, because that amount is claimed by the defendant, is held in possession by the defendant, and if necessary to the defendant in order to occupy and use Mission Island, is equally essential to the United States.

If, however, there be submerged land not occcupied or used by the defendant, the United States is certainly entitled to recover the entire area which is occupied and used, including the island as expanded, with the wharves, docks, piers, and all permanent improvements attached to and made a part of the realty. It is quite impossible to separate these from the island as it once stood. To recover the island it is absolutely necessary to recover them. To recover Mission Rock as it once stood would be a victory as barren as the rock itself.

In the leading case of *Martin* v. *Waddell*, 16 Peters, 367 (1843; Taney J.), an action in ejectment was brought to determine the title to land under tide water

in New Jersey. The plaintiff below claimed the land under a grant from the original proprietors, while the defendant based his title upon a New Jersey statute, passed in 1824, giving him an exclusive right to take oysters. The court gave judgment for the defendants under the State grant, holding that the title to the submerged land granted to the original proprietors was a public right, which they received in trust for the people who might settle that territory. Upon the Revolution, this title became vested in the State of New Jersey for the benefit of the people. The principal question in dispute between the parties in this suit, and, indeed, the only one of any value, was the oyster fishery. (*Den* v. *Jersey Co.*, 15 Howard, 426, 432.)

In *Frisbie* v. *McClernin*, 38 Calif., 568 (1869), it was held that ejectment would lie to recover a strip of overflowed land, the use and occupation of which for wharf purposes was granted by the State to the plaintiffs, Sawyer, C. J., saying (p. 571):

> The grantees had an estate in the land, which authorized them to take possession, occupy and control it for the purposes of the grant. They had a right to the possession of the land in order to apply it to the purposes indicated. There was something of which they could be dispossessed, and they were ousted from the possession and occupation.

In *Coburn* v. *Ames* (52 Calif., 385) it was held that in a case where no question of riparian rights intervened, the State, as the owner of lands covered by navigable waters, might maintain ejectment for a

wharf constructed without authority of law below the line of low water (p. 398).

Assuming that the riparian owner is entitled to wharf out to deep water, the court pointed out that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election. If he did not see fit to exercise it, the court held that he could not maintain ejectment to recover the possession of wharves erected by others, simply for the purpose of demolishing them. If obstructed in the exercise of the right of wharfing out, he might maintain an action for damages, and if the obstructions amounted to a public nuisance, it might be abated by an appropriate proceeding.

It is to be observed that this does not apply to the case at bar. There is no existing nuisance here which could be abated, as detached from and not a part of the island. The improvements made are attached to and a part of the land owned by the Government. The only method of obtaining the advantage of the possession and use of Mission Island as it stands now, is an action of ejectment which will give the Government of the United States complete control of the island and the surrounding water.

XI.

As to the action of the Government officer who fixed the harbor or dock lines surrounding Mission Island, that officer acted simply upon the visible facts presented to him. It wasn't his business to inquire into the title of Mission Island. That island, at the time

he fixed this line, was in the occupation of the California Dry Dock Company, which had filled in a certain quantity of submerged land about it, and had constructed or was constructing docks and warehouses. Taking the situation as it was, he fixed the line beyond which they should not fill in. Having no authority to determine questions of title, his action can in no wise be held to estop the Government.

XII.

For a discussion of the relation of President McKinley's order of January 13, 1899, permanently reserving these islands "*for naval purposes*," to section 5 of the act of Congress of July 1, 1864 (13 Stat., 332), I refer the court to the opinion of the circuit court of appeals (Rec., pp. 31 et seq.).

It seems to me that this order of the President may be read without reference to the act of July 1, 1864. If, as the circuit court of appeals held, this act had no relation to Mission Rock and the adjacent islands, "which were and are far outside of the Pueblo grant of lands claimed by and confirmed to the city" (Rec., p. 33), the order of President McKinley may be read, not as a reservation under that act, but as an appropriation of Mission Island and the small island southeast thereof, with the shores, contiguous submerged land, and navigable water appurtenant thereto, permanently for naval purposes. I mean, of course, an appropriation, not in the sense of a condemnation for public purposes of private land, but as a designation of the particular public use to which these islands, long set apart

from sale, were to be finally and permanently devoted. (Respecting the authority of the President to set aside parcels of land belonging to the United States for particular public uses, see *Grisar* v. *McDowell* (6 Wall., 363, 381; Opinion Attorney-General MacVeagh, 17 Opin., 160).

The court will observe that in *Grisar* v. *McDowell*, it is stated that the original order of President Fillmore, made November 5, 1850, was modified by a subsequent order made December 31, 1851, the court saying (p. 371):

> He (the President) possessed the same authority in 1851 to modify the reservation of 1850, by enlarging or reducing it, that he possessed to make the reservation in the first instance.

In the view I take of this case, these islands, not being included in the public lands surveyed and thrown open to preemption and sale, were, from the time of the acquisition of this territory from Mexico, reserved and set aside for some public use. The particular use to which the islands were to be devoted was not specified until the order of President McKinley of January 13, 1899, when they were permanently reserved "*for naval purposes.*" The reference made in this Executive order to the official plat on file in the General Land Office did not limit the reservation to the area stated on the plat. The reservation was of "Mission Island and the small island southeast thereof," as they then existed, with all the rights appurtenant thereto, and necessary for their use "for

naval purposes." This included, of course, the right to reclaim the land under shallow water up to the point of navigability, and erect thereon wharves, docks, and piers, where vessels of the United States might land. If a private corporation had without authority filled in the land and constructed permanent wharves, piers, docks, etc., making them a part of the islands, then the reservation operated as an appropriation of these additions to the realty, for reasons before stated.

If there are any equitable claims to compensation on the part of the defendant, growing out of the cost of the improvements made, these may safely be left to the consideration of Congress.

JOHN K. RICHARDS,
Solicitor-General.

FEBRUARY 26, 1903.

APPENDIX.

ACT ADMITTING CALIFORNIA.

(9 Stat., 452.)

CHAP. L.—*An act for the admission of the State of California into the Union.*

Whereas the people of California have presented a constitution and asked admission into the Union, which constitution was submitted to Congress by the President of the United States by message dated February thirteenth, eighteen hundred and fifty, and which, on due examination, is found to be republican in its form of government:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

SEC. 2. *And be it further enacted*, That, until the Representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of California shall be entitled to two Representatives in Congress.

SEC. 3. *And be it further enacted*, That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal *of the public lands* within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the

same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever *upon the public domain* of the United States, and in no case shall non-resident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor: *Provided*, That nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the constitution of that State.

Approved, September 9, 1850.

THE GRANT.

(Stat. Cal., 1869–70, p. 801.)

AN ACT to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor. (Approved April 4, 1870.)

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Henry B. Tichenor is hereby authorized to have a survey and map made, at his own expense, by the city and county surveyor of San Francisco, *of the lands belonging to the State*, situated in said city and county, and *included within the following boundaries*, to wit: Commencing at a point in the bay of San Francisco, distant three thousand five hundred and seventy (3,570) feet southeasterly from the southerly corner of Brannan and Second streets, as the same are laid down on the official map of said city, said distance being measured along the extension, southeasterly of the southwesterly line of Second street; thence in [a] southwesterly direction, at right angles with said line of Second street extended, five hundred (500) feet; thence at right angles southeasterly eight hundred

(800) feet; thence at right angles northeasterly eight hundred (800) feet; thence at right angles northwesterly eight hundred (800) feet; and thence at right angles southwesterly three hundred (300) feet, to the point of commencement; said tract of land being a square, including the rock known as Mission Rock; and upon the approval of such survey by the surveyor-general, *and the payment by said Tichenor to the State treasurer, of the value of all the lands within said described boundaries which shall be shown by such survey and map to lie below ordinary high-water* mark, at such rate as shall be assessed by the board of State tide land commissioners per acre, and upon the production to the governor of the receipt of the State treasurer, and of a copy of said map, with the certificate of the surveyor-general of his approval thereof, a patent *for said lands* shall be issued to said Tichenor, his heirs, and assigns: *Provided*, That such patent shall not be issued until said Tichenor, his heirs or assigns, *shall have constructed a marine railway or dry dock at said Mission Rock.*

SEC. 2. This act shall take effect and be in force from and after its passage.

THE PATENT.

UNITED STATES OF AMERICA, *State of California.*

To all to whom these presents shall come, greeting:

Whereas under the provisions of an act of the legislature of the State of California, entitled "An act to provide for the sale and conveyance *of certain submerged lands* in the city and county of San Francisco to Henry B. Tichenor," approved April fourth, eighteen hundred and seventy, the sale and conveyance to the said Henry B. Tichenor of the tract of land hereinafter described was authorized and directed upon certain

conditions therein recited; and whereas, the said recited conditions, to wit, a survey and map made, at his own expense, by the city and county surveyor of San Francisco; payment to the State treasurer of the value of all the lands within said described boundaries, at the rate assessed by the board of State tide land commissioners per acre; the production of the receipt of the State treasurer, and a copy of said map with the certificate of the surveyor-general of his approval thereof; and the construction of a marine railway or dry dock at Mission Rock, have been fully complied with by the said Henry B. Tichenor,

Now, therefore, in the name and by the authority of the people of the State of California, and by virtue of authority in me vested, I, Newton Booth, governor, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto Henry B. Tichenor, all the following-described lands, to wit: A fraction in the west half of section eleven (11), township two (2) south, range five (5) west, base and meridian of Mount Diablo, and more particularly described in the field notes of said survey, as follows: Commencing at a point in the bay of San Francisco distant three thousand five hundred and seventy (3,570) feet southeasterly from the southerly corner of Brannan and Second streets, as the same are laid down on the official map of said city, said distance being measured along the extension southeasterly of the southwesterly line of Second street, and running thence south 45 degrees west five hundred (500) feet; thence south 45 degrees east eight hundred (800) feet; thence north 45 degrees east eight hundred (800) feet; thence north 45 degrees west eight hundred (800) feet; thence south 45 degrees west three hundred (300) feet to the place

of beginning, said tract of land being a square, including the rock known as Mission Rock, *and containing fourteen and* $\frac{35}{100}$ *acres exclusive of said rock*, to have and to hold unto him the said Henry B. Tichenor, his heirs and assigns forever.

[SEAL.] In testimony whereof, I, Newton Booth, governor of the State of California, have caused these letters to be made patent and the seal of the State of California to be hereunto affixed.

Given under my hand, at the city of Sacramento, this the eleventh day of July, in the year of our Lord one thousand eight hundred and seventy-two.

NEWTON BOOTH,
Governor of State.

Attest: DRURY MELONE,
Secretary of State.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE MISSION ROCK COMPANY. } No. 198.

MEMORANDUM BY THE SOLICITOR-GENERAL IN REPLY.

To my surprise, counsel for the Mission Rock Company, on oral argument, made the unqualified assertion that under the statutes and decisions of California a proprietor of land abutting on tide water has no riparian rights. The only cases I recall he cited were *Coburn* v. *Ames* (52 California, 385), and *Weber* v. *Board of Harbor Commrs.* (18 Wall., 57). As both these cases had been cited in my brief, I did not deem it worth while to make any oral reply. Since then I have re-read these cases and others on the subject of riparian rights under California law, and for the purpose only of aiding the court, I am printing this memorandum. I shall furnish opposing counsel a copy of it.

21553—03

I.

As this case stands, there being no appeal by the Mission Rock Company from the judgment of the circuit court of appeals, it is conceded that the United States is entitled to the possession of Mission Rock as it existed before the improvements made by the defendant and its grantors; that is, that Mission Rock was an island, constituting upland, distinct from submerged land, and owned by the United States.

II.

But it is asserted that even if the United States owned this island it had no riparian or littoral right of access to the navigable waters surrounding it.

The case of *Coburn* v. *Ames* (52 Calif., 385) leaves undecided the right of the riparian owner to wharf out to deep water. It assumes that the riparian owner is entitled to wharf out to deep water, the court saying (p. 397):

> For our present purpose, we shall assume that the proceedings were null and void, and conferred no right to construct the wharf or chute, and shall *further assume that the plaintiff, as a riparian owner, is entitled to wharf out to deep water.*

Again (p. 398):

> *Assuming* as we do, for the purposes of this decision, that *the riparian owner is entitled to wharf out to deep water*, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election.

In a later case, *Shirley* v. *Bishop*, 67 Calif., 543 (1885), the riparian rights of an owner of land bordering on the Straits of Carquinez, were explicitly upheld. These straits connect the Bay of San Pablo, really the upper portion of the Bay of San Francisco, with Suisun Bay, really a further extension of the Bay of San Francisco, being what might be termed the extreme northeast portion of the Bay of San Francisco into which the Sacramento River empties. The city of Benicia lies on the navigable waters of the Straits of Carquinez. The action was one to prevent the construction of a wharf, and to cause the removal of the portion thereof already constructed, which interfered with the access of the riparian proprietor to the navigable waters of the Straits of Carquinez.

The court said (p. 545):

> There was no compensation "first made or paid" plaintiffs for the damages to their said property, as should have been done in order to meet the requirements of section 14, article 1, of the constitution of California. (*Reardon* v. *San Francisco*, 66 Cal., 492.) The wharf if built by defendants as contemplated would deprive the plaintiffs of ingress and egress to and from their lots and the navigable waters of the State.
>
> On the eastern side of said lots the navigable waters of the Straits of Carquinez are a public highway. (Pol. Code, sec. 2348.) *The free access to that public water highway was a vested right* and privilege that belonged to the plaintiffs, and of which they could not be deprived in the manner claimed as legal in this contention.

(Pol. Code, sec. 2919; *Schulte* v. *N. P. T. Co.*, 50 Cal., 592; *Blanc* v. *Klumpe*, 29 Cal., 156; *Sackland* v. *N. M. R. R. Co.*, 31 Mo., 181; Gould on Waters, secs. 123, 124, 149, 150, 154, and cases there cited.)

If the wharf of the defendants could be built and was allowed to stand, it would preclude the plaintiffs from building any wharf as to 60 feet of their water front, declared such by law, and would prevent ingress and egress of vessels from a wharf previously built by them on another portion of their water front, of said block of land, and this effect upon their land in the absence of all compensation would, if not prevented, result in injury grievous and irreparable, from which as threatened they should have relief.

It clearly appears by the findings that the defendants were creating a *nuisance* in the navigable waters of the State. (Civ. Code, sec. 3479; *Blanc* v. *Klumpe*, 29 Cal., 156.)

Under the circumstances of this case, it is not legal or equitable to construct and maintain the wharf as contended for by the defendants; it would be in disregard of private rights and result in great and irreparable damage to private property, without compensation, for an *ostensible public use.*

Judging from the map, Carquinez Straits must be between 1 and 2 miles wide—probably three times as wide as the body of navigable water lying between Mission Island and the city of San Francisco.

Section 14, article 1, of the constitution of California

referred to by the court provides (Deering's Annotated Code, p. 35):

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

Section 2348, Political Code, also referred to above, provides (Deering's Annotated Code, p. 357):

> Navigable waters, and all streams of sufficient capacity to transport the products of the country, are public ways for the purposes of navigation and of such transportation.

Section 2919 of the Political Code reads:

> No authority must be granted under this chapter to interfere with vested rights, nor to interfere with or infringe grants heretofore made by State authority; nor does authority to construct a wharf, chute, or pier continue for a longer period than two years, unless the same is within that time completed.

Gould on Waters (3d edition) says respecting riparian rights in California, section 174:

> In California the owner of land bordering upon the seashore holds presumably only to

> ordinary high-water mark, and the shore itself is presumed to remain the property of the State, *while the right to wharf out appears to be conceded.*

Citing many California cases, to which I ask the court's attention.

In 1 Dillon's Municipal Corporations (4th ed.), page 169, the right of the riparian owner, under the common law, to wharf out, is thus stated:

> SEC. 106. By the common law, the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially recognized in this country, and riparian proprietors on ocean, lake, or navigable river have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the State for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country. *The right terminates at the point of navigability*, unless special authority be conferred, because at this point the necessity for such erections ordinarily ceases. Such structures are presumably lawful where they are confined to the shore, and no positive law is violated in their erection.

The dissenting opinion in *Scranton* v. *Wheeler* (179 U. S., 141, 165), contains an elaborate review of the cases, both State and Federal, on the subject of the riparian right of access to navigable waters.

In my argument I insisted that this court in *Weber* v. *Harbor Comm'rs* (18 Wall., 57) had explicitly affirmed the doctrine laid down in *Yates* v. *Milwaukee* (10 Wall., 497, 504), and this further appears by the language of the court in *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.* (109 U. S., 673, 682):

> A riparian proprietor, in the language of Mr. Justice Miller in *Yates* v. *Milwaukee* (10 Wall., 497–504), is one "whose land is bounded by a navigable stream;" and among the rights he is entitled to as such are "access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. (*Weber* v. *Harbor Commissioners*, 18 Wall., 57.)

In *Polhemus* v. *Bateman* (60 N. J. Law, 163), it was held that a deed from the riparian commissioners of New Jersey of some seventy acres of land under navigable water, which recited that if the grantee was not the owner of the *ripa*, the deed should be void, might, in an action brought by the grantee against a citizen who was engaged in fishing upon the granted land, be assailed by evidence showing that the grantee was not the owner of the *ripa*.

In *Marcus Sayre Co.* v. *Newark*, 60 N. J. Eq., 360 (1900), in the concurring opinion of Depue, J., this language is used (p. 372):

> But by the common law of England and the local common law of this State, the owner of

riparian lands acquires a property in his reclamations by wharfing out or otherwise improving, and the State can not appropriate the shore so recovered to public use without adequate compensation. Consequently, for any invasion of his property or use of it without lawful authority such owner is entitled to the same remedies as the owner of property is entitled to under the general law of the State. Among the rights of the riparian owner who has made his improvements between high and low water mark is the right to the use of his wharf and of access to the navigable waters. (Citing *Lyon* v. *The Fishmongers Co.*, L. R. 1 App. Cas., 662, 671.)

III.

In *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S., 525 (1885, Field, J.), while the court held that the property and franchises of a railroad within the Fort Leavenworth Military Reservation were taxable by the State of Kansas owing to the fact that, in the act admitting Kansas as a State, there was no reservation of Federal jurisdiction over the reservation, and in the subsequent act of Kansas ceding to the United States jurisdiction there was a proviso "saving further to said State the right to tax railroad, bridge, or other corporations, their franchises and property on said reservation," nevertheless the court asserts that any exercise by a State of jurisdiction over Federal property inconsistent with the Federal use to which such property has been devoted can not, under the Constitution, be permitted to exist. Thus the court says (p. 539):

> Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: That if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government.

Again, bottom page 541:

> It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the General Government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes.

All this applies to an island belonging to the United States and of such character and location that the President has deemed it advisable to reserve it permanently for naval purposes.

IV.

In the oral argument, opposing counsel described the marine railway which was constructed at Mission

Rock to comply with the condition of the California grant. There is nothing in the record upon this point, and I have not been able, up to this time, to ascertain the precise use made of Mission Rock in connection with this railway. The effect and apparent purpose of counsel's statement was to lead the court to believe that the island was of no use in connection with the operation of the marine railway. But I can not understand how a ship could be pulled up on the marine railway except by a power operated from or attached to the island. Certainly the ships did not sail or steam up on the marine railway. If warped up, there must have been an attachment on the island. Possibly the height of the rock served a good purpose in this connection. Moreover, according to counsel, the marine railway was used as a means of exposing the hull and bottom of the ship, so that repairs might be made. There must have been a place for keeping the machinery, tools, and materials needed to make such repairs, and no doubt the island was useful for this purpose. Ships loaded with ballast putting in for repairs would doubtless dump their ballast before being hauled up on the marine railway, and it is a fair inference that deposits thus made at the island suggested and led to the use ultimately made of it.

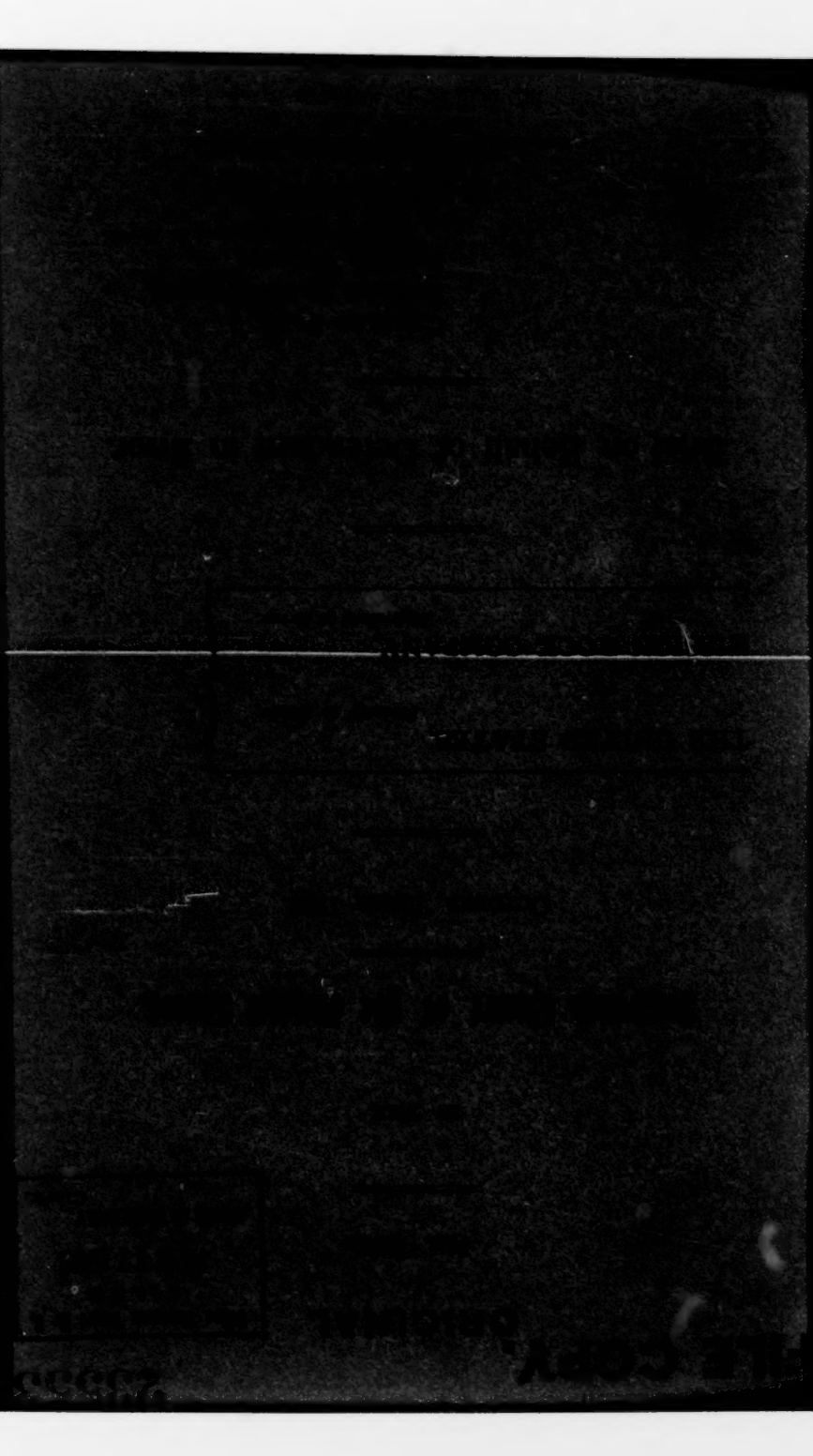
JOHN K. RICHARDS,

Solicitor-General.

MARCH 14, 1903.

O

23551



23554

IN THE

Supreme Court of the United States.

OCTOBER, TERM, 1902.

THE UNITED STATES,
Plaintiff in Error,
vs.
MISSION ROCK COMPANY,
Defendant in Error.

No. 198

BRIEF ON BEHALF OF DEFENDANT IN ERROR

The facts of this case were specially found by the Circuit Court. There is no dispute about their correctness. They are substantially as follows (Trans. p. 10):

The lands sued for in this action lie in the Bay of San Francisco, about half a mile from the original shore line of the peninsula on which San Francisco stands. All of the lands, fourteen acres, less a piece, which if rectagonal, would be seventy-eight feet square, generally known as "Mission Rock", and another adjacent piece, twenty feet square, were at the date of the admission of California into the Union, submerged lands over which the tide waters continuously ebbed and flowed. The excepted pieces are rocks, the larger of which rises above high tide between twenty and forty feet. These rocks are barren. They contain neither soil nor water and

are useless for any purpose, either agricultural or mineral. This was their condition on September 9, 1850, the date of the admission of California into the Union.

On the 4th day of April, 1870, the Legislature of California authorized the issuing of a patent for the lands sued for to one Tichenor upon payment of certain moneys by him and proof that he had, before patent issued, constructed at Mission Rock a marine railway or dry dock. On the 11th day of July, 1872, the patent of the State, which recited the fact of Tichenor's compliance with the conditions of the Act, was issued to him. The California Dry Dock Company became the purchaser of the premises in 1878. After that date it proceeded to and did reclaim enough of the lands conveyed, by filling in with rock, to make an area of four acres, upon which extensive warehouses were built for commercial purposes, and from which wharves were built out to accommodate shipping. From the date of the conveyance of these lands to the Dock Company, it was in exclusive possession, claiming ownership, until June 6th, 1900, when it conveyed them to the Mission Rock Company, plaintiff in error.

In 1894, the United States Engineer officer in charge of harbor work in San Francisco delineated on a map the limits beyond which further filling by the Dock Company must not go. This map was approved by the Secretary of War. A copy of it, with written notice of the prohibition of filling in, was served on the company.

On the 13th day of January, 1899, the President, purporting to act under the provisions of the Act of Congress, approved July 1st, 1864, designated and set apart for naval pur-

poses, "Mission Rock", described in the order as containing fourteen one-hundredths of an acre and the smaller adjacent rock already referred to, containing one one-hundredth of an acre.

This suit embraces far more than the land set apart by the order of the President. It includes all the made land adjacent to it and all the wharf improvements.

Upon the facts, the Circuit Court of Appeals decided that the United States was the owner and entitled to the rocks described in the President's order and that the defendant was the owner and entitled to the land which, prior to the making of any improvements by it, had been submerged land.

The United States assigns various errors as the basis of the writ of error prayed for.

These may be reduced to the following propositions:

a. That the submerged lands of the Bay of San Francisco granted to the ancestors of the defendant were never the property of the State of California, and could not be granted by it to any person for any purpose.

b. That the order of the President, purporting to be made under the Act of 1864, set aside all of the lands improved and filled in by the defendants' grantors, as well as those described in the order.

c. That the lands filled in are accretions appertaining to the rocks and belonging to the proprietor of the rocks.

d. That the State had no power to convey submerged

lands which interfered with the littoral rights of the owner of the rocks, claimed to be the United States.

The foregoing synopsis of the assignments brings before the Court all of the questions which arise in the case. Some of these questions, as it seems to us, will not be reached by the Court for discussion, for the reason that the authoritative judgments of this Court on the State's title to and right of disposition of the lands within its limits covered by navigable waters, would seem to dispose of the entire controversy.

The position of the defendant in error, and that of the United States, will be considered in this brief under the following heads:

1. *The submerged or tide lands became the property of the State on its admission. This right of property included the right to dispose of the land in its discretion, subject only to the right of control by the national government, if such disposition should interfere with the primary use of the waters over them as a means of commerce.*

2. *"Mission Rock", and the adjacent rocks, caps above the water's surface, were and are parts of the tidal lands, within the meaning of the constitutional principle which gives to each of the sovereign States its navigable waters and the soils under them.*

3. *The admission of the State on an equal footing with the original States gave to it all property above and below high water, not already given into private ownership or not reserved by the United States in the Act of admission. The reservation in that Act was of "public lands". These rocks were not "public lands".*

4. *The Act of 1864 did not relinquish any claim of the United States to tidal lands or to rocks in the bay. That Act referred to lands on the mainland. Hence, the President's reservation of "Mission Rock" was nugatory.*

5. *Assuming that "Mission Rock" was included in the meaning of the Act, then the title passed to the City of San Francisco. It has not since been revested in the United States, so that the latter can maintain ejectment for the rock.*

I.

THE SUBMERGED OR TIDE LANDS BECAME THE PROPERTY OF THE STATE ON ITS ADMISSION. THIS RIGHT OF PROPERTY INCLUDED THE RIGHT TO DISPOSE OF THE LAND IN ITS DISCRETION, SUBJECT ONLY TO THE RIGHT OF CONTROL BY THE NATIONAL GOVERNMENT, IF SUCH DISPOSITION SHOULD INTERFERE WITH THE PRIMARY USE OF THE WATERS OVER THEM AS A MEANS OF COMMERCE.

The Act of September 9, 1850, admitted California into the Union "*on an equal footing* with the original States in all respects whatever", 9 *Stat.* 452, subject only to the conditions:

(*a*) That the new State "shall never interfere with the "primary disposal of the public lands within its limits, and "shall pass no law and do no act whereby the title of the "United States to, and right to dispose of, the same shall be "impaired or questioned".

(*b*) That the new State "shall never lay any tax or as- "sessment * * * upon the public domain of the United "States".

(*c*) That the new State "shall not tax non-resident citizens higher than residents".

(*d*) That the navigable waters within the State shall be "common highways, forever free to all citizens without any "tax, impost or duty therefor".

The admission of the new States "upon an equal footing "in all respects whatever with the original States" was provided for by the Acts of cession by Virginia in 1784, whereby that State granted to the United States the great northwestern territory. This language was followed thereafter in all the Acts of Congress admitting new States. It is of great consequence in determining the right of California to the land in controversy in this action.

The first State admitted was Kentucky, in 1791, which was carved out of the Virginia territory. That State, therefore, came into the Union, as was provided in the statute of Virginia authorizing the cession, "having the same rights of "sovereignty, freedom and independence as the other States". (See *Pollard's Lessee* vs. *Hagan*, 3 How. 221.)

Regarding the rights of Alabama on the same subject, the Court said in the same case (pp. 228, 229):

> "Alabama is, therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the Constitution, laws and compact to the contrary notwithstanding."

This language is quoted by the Court in *Shively* vs. *Bowlby*, 152 U. S. 27 and is followed by the observation in that, its latest opinion on the subject:

> "That these decisions do not * * * rest solely upon the deeds of cession from the State of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the Treaty of Guadalupe Hildalgo of 1848." (*Citing many cases.*)

In *Illinois Central* vs. *Illinois*, 146 U. S. 434, the Court, referring to the right of Illinois under the Virginia cession to equality of right with the original States, asserts the same rule in unmistakable language, and adds:

> "The equality prescribed would have existed, if it had not been thus stipulated. There can be no distinction between the several States in the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits."

In *Fort Leavenworth Co.* vs. *Lowe*, 114 U. S. 526, the Court said:

> "But in 1861 Kansas was admitted into the Union on an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States."

In this case it was held that when Kansas was admitted as a State, the military reservation of the United States, except the fort and ground immediately round it, became subject to the jurisdiction of Kansas. The United States

> "could have excepted the place from the jurisdiction of Kansas, as one needed for the general uses of the government. But from some cause, inadvertence perhaps, or over confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained, after the admission of the State, only the rights

> of an ordinary proprietor. * * * So far as the land constituting the reservation was not used for military purposes, the possession of the United States was only that of an ordinary proprietor." p. 526.

The accepted doctrine, therefore, as to the status of a State upon admission is that it thereby becomes endowed with all the rights over persons and property which the original States had and have, except so far as any such rights may be specially and expressly reserved by the United States.

The original States, on adoption of the Constitution, surrendered certain rights and powers to the Federal Government. The new States, in joining the Union, surrendered the same rights and powers, but none other than those, unless the surrender of additional powers was prescribed as a condition of admission. Therefore, whatever rights of property and dominion were retained by the original States, these were also retained by the new States, except so far as they had been expressly given up.

It has been uniformly held that upon the admission of a State into the Union, the tide lands or the lands under tide waters vest in the State.

There is no distinction between lands diurnally covered and uncovered by the tides and lands which are constantly covered by the tides, even when at their lowest stage. The sovereignty of a State (and upon this principle of sovereignty, the right and title to the waters of the State and the lands under them rests) cannot be satisfied by the ownership and control of a few feet of shore. In *Pollard* vs. *Hagan*, 3 How. 230, the Court said:

"This right of domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it * * * *. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power *into the sea,* it is there, as on the shore, but municipal power, subject to the Constitution of the United States and 'the laws which shall be made in pursuance thereof'. By the preceding course of reasoning we have arrived at these general conclusions: First: The shores of navigable waters *and the soils under them*" (i. e. the soils under navigable waters) "were not granted by the Constitution to the United States but were reserved to the States respectively. Secondly: The new States have the same rights, sovereignty and jurisdiction over this subject as the original States. Thirdly: The right of the United States to the public lands and the power of Congress to make all needful rules and regulations for the disposition thereof, conferred no power to grant to the plaintiff the land in controversy in this case."

The land sued for lay below high water mark in Mobile Bay at the time of the admission of Alabama into the Union. The United States had given a patent to the land. This patent was held to convey no title. The greater part of the language above quoted was also quoted in *Gilman* vs. *Philadelphia,* 3 Wall. 726, as the sound principle governing the rights of the States to the soils under their waters.

In *Martin* vs. *Waddell,* 16 Pet. 410, the Court had already said:

"When the Revolution took place the people of each

> State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution."

The question thus decided has been passed upon by the Court in cases affecting California on several occasions. The lack of distinction between tide lands and submerged lands, so far as the ownership of either by the State is concerned, has been already shown by the cases quoted from, which concede the State's title to the "navigable waters and the soils under them", as well as to the shores bordering on navigable waters. In *San Francisco* vs. *LeRoy*, 138 U. S. 671, the Court defined the character of lands which passed to California on her admission.

> "The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide; but only those over which tide-waters flowed so continuously as to prevent their use and occupation. To render lands tide-lands which the State by virtue of her sovereignty could claim there must have been such *continuity* of the flow of tide-water over them, or such *regularity* of the flow within every twenty-four hours as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied." This definition was quoted in *Knight* vs. *U. S. Land Association*, 142 U. S. 186.

In *Weber* vs. *Harbor Commissioners*, 18 Wall. 65, the application of the rule to submerged lands, lying exactly as the lands now in suit lie, was absolute. We quote the language of Justice Field:

The complainant's "land is situated nearly half a mile from "what was the shore of the Bay of San Francisco at the time

"California was admitted into the Union, and over it the "water at the *lowest tide* then flowed at a depth sufficient to "float vessels of ordinary size. Although the title to the soil "under the tide-waters of the bay was acquired by the United "States by cession from Mexico, equally with the title to the "upland, they held it only in trust for the future State. Upon "the admission of California into the Union upon equal foot- "ing with the original States, *absolute property in and domin- "ion and sovereignty over all soils under the tidewaters within "her limits passed to the State, with the consequent right to "dispose of the title to any part of said soils in such manner "as she might deem proper,* subject only to the paramount "right of navigation on the waters, so far as such navigation "might be required by the necessities of commerce with foreign "nations or among the several States, the regulation of which "was vested in the general government."

It is common knowledge that all that part of the City of San Francisco below Montgomery street in places, and Sansome street in other places as far east as the line of the present water front, a distance of a quarter of a mile, was once covered by tide waters. If the title to the lands round Mission Rock did not pass to the State of California on its admission as a State, the title to all of the now filled in lands in the area described, was never in the State. All of that property with its vast improvements including wharves, therefore, would still belong to the United States. That these lands must have once been submerged lands, the Court knows from the fact that the tides do not recede in this locality for such a distance. The writer of this brief himself saw the remains of the ship "Niantic" dug up at the northwest corner

of Clay and Sansome streets, a quarter of a mile from the present water front. On the other hand, if the United States has no title to such parts of San Francisco, it has no title to the filled in lands round Mission Rock. The untenableness of any other position may be well illustrated by the inquiry: Supposing a rocky cone to stand to-day at the corner of Front and California streets, what title would the occupants of all the surrounding lands, once not land, but navigable waters round the rock, have to their blocks of buildings? If their title should be deemed good, that of the Mission Rock Company is equally good.

It is not a valid argument to say that if it be in the power of the State to grant any tract of land under the waters of the bay, it must also be in its power to grant away all of such lands. The case, *Illinois Central* vs. *Illinois*, 146 U. S. 452, distinctly recognizes that grants in limited quantities and for the public accommodation, may be made. The Court says:

> "The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, *for which purpose the State may grant parcels of the submerged lands,* and so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce and grants of parcels, which being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State

over lands under the navigable waters of an entire harbor or bay, or of a sea or lake."

The statute which granted the lands in controversy expressly required as a condition, the building thereon of a marine railway. This was done, and since that time, docks and warehouses have been built on the reclaimed land. All these are in aid of commerce. They do not impair navigability. The United States itself now seeks to gain the property with the intention of using it as a coaling station. It does not complain that the State has violated a trust in making the grant. It does not propose to restore the reclaimed lands to their former submerged state. It intends, as the President proclaims, to continue them in their present use, but not as docks and wharves for the convenience of the general public. The government wants them for naval uses. This fact should be conclusive, under the *Illinois* case, that the State, if it had the title when it conveyed to Tichenor, made a grant of it which was in full discharge of the trust under which it had held the fee.

In *Lowndes* vs. *Huntington*, 153 U. S. 1, 30, the Court held that the grant of lands under the waters of Huntington Bay, from low water mark out, "for the purposes of oyster "cultivation", was valid. The Court said:

> "Either the title to these submerged lands passed by virtue of the colonial grants to the town of Huntington, or else it was in the State of New York (*Martin* vs. *Waddel*, 16 Pet. 367; *Pollard* vs. *Hagan*, 3 How. 212; *Shively* vs. *Bowlby*, 152 U. S. 1, and this Act" (of the Legislature of New York) "whose validity seems not to be questioned, cedes all the right, title and interest of the State in these lands to the town, so far at least as is necessary for the purpose of oyster cultivation."

The *Illinois* case further holds that the fact that there is no tide land in the Great Lakes, does not affect the right of the State. That right is the right to the soil *under its navigable waters* (146 U. S. 436).

See also

Morris vs. *U. S.*, 174 U. S. 236;
Mann vs. *Tacoma*, 153 U. S. 273;
Knight vs. *U. S. Assn.*, 142 U. S. 183;
Hardin vs. *Jordan*, 140 U. S. 381;
Packer vs. *Bird*, 137 U. S. 382;
Co. of St. Clair vs. *Lovingston*, 23 Wall. 64-68;
Barney vs. *Keokuk*, 94 U. S. 336-338;
Gilman vs. *Philadelphia*, 3 Wall. 726;
Mumford vs. *Wardwell*, 6 Wall. 436;
Smith vs. *Maryland*, 18 How. 74;
Goodtitle vs. *Kibbe*, 9 How. 471;
Pacific Gas Co. vs. *Ellert*, 64 F. R. 434.

The Supreme Court of California asserted the same doctrine in *Oakland Water Front Case*, 118 Cal. 182, while the claim of ownership in such lands is recognized by the statute of the State in the *Civil Code*, sec. 670. (A like statutory claim by Washington is referred to in *Mann* vs. *Tacoma*, 153 U. S. 284.)

The right of the State to its navigable waters includes the right to the fish in them and the use of the beds for the planting of oysters to the exclusion of the citizens of other States.

Macready vs. *Virginia*, 94 U. S. 391;
Smith vs. *Maryland*, 18 How. 74;
Trustees vs. *Lowndes*, 40 Fed. R. 630.

The United States may appropriate tide lands though sold by the State, if the necessities of commerce shall require

them, *but if they have been improved they can be taken only upon due compensation made.*

Scranton vs. *Wheeler,* 57 Fed. R. 812;
Monongahela vs. *U. S.,* 148 U. S. 312.

The State may create an obstruction to navigation when commerce will be thereby aided.

In *Gilman* vs. *Philadelphia,* 3 Wall. 713, it appears that the State of Pennsylvania in 1857 authorized the City of Philadelphia to erect a permanent bridge over the Schuylkill river at Chestnut street. We quote from the opinion of the Court:

> "The complainants are citizens of other States and own a valuable and productive dock and wharf property above the site of the contemplated bridge. The river is navigable there for vessels drawing from eighteen to twenty feet of water. Commerce has been carried on in all kinds of vessels for many years to and from complainant's property. The bridge will not be more than thirty feet above the ordinary high-water surface of the river and hence will prevent the passage of vessels having masts. This will largely reduce the income from the property and render it less valuable. The defendants are proceeding to build the bridge under the authority of an act of the Legislature of Pennsylvania. The Schuylkill river is entirely within her limits and is 'an ancient river and common highway of the State'. For many years it has been navigable for masted vessels for the distance of about seven and a half miles only from its mouth."

The Court continued:

> "The river, being wholly within her limits, we cannot say the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise

in good faith cannot be made the subject of review by this Court" (p. 732).

Regarding the State's discretion in such case, it said (p. 729):

> "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs."

Following this case, it was said in *Assante* vs. *Charleston Bridge Co.*, 41 F. R. 365:

> The bridge "is across a navigable stream of the United States, but in the absence of legislation by Congress, States may authorize bridges across navigable streams by statutes so well guarded as to protect the substantial rights of navigation. Or, as it has been put, no State can permit an obstruction of the navigable waters of the United States. But, although every bridge having piers *ex necessitate* is more or less an obstruction, still it may be built if a passage is reserved of sufficient width for the purposes of foreign and domestic commerce."
>
> See also *Rhea* vs. *Newport*, 50 F. R. 16;
> *Willammete Bridge Co.* vs. *Hatch*, 125 U. S. 1.

The State may, in aid of its own commerce, remove obstructions, deepen channels and improve them generally, if such acts do not impair their navigation or defeat any system provided by the general government.

Mobile vs. *Kimball*, 102 U. S. 699.

In the case of the "Mission Rock" improvements, the Government, through the Secretary of War and the Corps of Engineers, recognized the rights of the Dock Company and de-

fined the limits beyond which further filling would interfere with navigation.

The illustrations above given establish conclusively the *"absolute property in and dominion and sovereignty over all soils under the tidewaters"* which the State possesses, subject only to the paramount right of the Federal Government to control the State's action under the "commerce clause" of the Constitution in reference thereto, or to subject them to the needs of commerce. The necessities of the navy of the United States, which call for a convenient coaling station, are not necessities of commerce with foreign nations or among the several States. Even if they were, the property cannot be taken except upon compensation to the State's grantee.

The State of California in patenting the land to Tichenor on condition that he should erect "a dock or marine railway at Mission Rock" devoted the land in aid of commerce, an object carried to a conclusion by the Dock Company, which spent enormous sums in making the land available and in the construction of warehouses and docks for commercial purposes.

We submit, therefore, that the lands covered by tide waters were the property of the State, and that the State's title, conveyed to Tichenor, and thereafter conveyed to the Mission Rock Company, vested in the latter absolute dominion therein, subject only to such regulations of the United States with reference to the keeping open of navigable channels as its officers might make. These have been made and complied with, as we have seen.

It needs no argument on our part to support the self-evident

proposition that if the title to the submerged lands vested in the defendant in error and its predecessor, they had the right to improve them by filling in, and that the area thus made available by being brought above the water level, belongs to the grantee of the State regardless of the ownership by the United States of lands adjoining such submerged lands, if there be such ownership.

II.

"MISSION ROCK" AND THE ADJACENT ROCKS, CAPS ABOVE THE WATER'S SURFACE, WERE AND ARE PARTS OF THE TIDAL LANDS, WITHIN THE MEANING OF THE CONSTITUTIONAL PRINCIPLE WHICH GIVES TO EACH OF THE SOVEREIGN STATES ITS NAVIGABLE WATERS AND THE SOILS UNDER THEM.

The little cap, which, if rectangular, would at its base at high water enclose a space 78 feet by 78 feet, and the adjacent cap, 20 feet square, though they emerge above the tide waters, are nevertheless part of the dominion and soil which passed to the State upon its admission. They are mere specks upon an enormous surface of land and water belonging to the State. The law will not be guilty of the incongruity which is implied in the assertion that, though the State owns its shore-line from its northern limits to the Mexican boundary, it still does not own the few rocks scattered miles apart and imbedded in the shore, which, by chance, lift their caps sufficiently high to be above ordinary high tide. If the State owns such rocks, then it owns the rocks in controversy, which stand out as mere points above the waters. They are part of the navigable waters and of the soil under the navigable waters. The State may, as we have seen, destroy them as

obstructions, or turn them to use as improvements to navigation.

The right to use or destroy is a right of ownership. The right of sovereignty implies the right of defense of a State's borders. The right would be in theory, nullified if another sovereignty should be allowed to own or dispose of a part of the approaches to those shores.

> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."
> *Pollard* vs. *Hagan*, 3 How. 230.

The reason for conceding the right of the State to the lands under navigable waters applies equally to the rocks that project from such waters. In *Shively* vs. *Bowlby*, 152 U. S. 1, 49, the Court said:

> "The Congress of the United States in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and being chiefly valuable for the public purposes of commerce, navigation and fishery, *and for the improvements necessary to secure and promote those purposes*, shall not be granted away during the period of territorial government."

We may well imagine a sand spit rising a foot or two above

high-water mark situated at a distance from the ocean shore. Would such spit own a sovereignty other than that of the shore and mainland?

III.

THE ADMISSION OF THE STATE ON AN EQUAL FOOTING WITH THE ORIGINAL STATES GAVE TO IT ALL PROPERTY ABOVE AND BELOW HIGH WATER, NOT ALREADY GIVEN INTO PRIVATE OWNERSHIP OR NOT RESERVED BY THE UNITED STATES IN THE ACT OF ADMISSION. THE RESERVATION IN THAT ACT WAS OF "PUBLIC LANDS". THESE ROCKS WERE NOT "PUBLIC LANDS".

California, upon her admission into the Union upon an equal footing in all respects whatever with the original States, became the proprietor of all lands, above and below the line of tide water, to the same extent that Massachusetts or Virginia, was such owner at the time when she joined the Union, except only so far as the Act of Admission took from California by express words any portion of such dominion.

The ownership of Massachusetts in its shores is described by Chief Justice Gray as follows:

> "The commonwealth of Massachusetts has all the title and rights, public and private, both of the King and the Parliament of England in every part of the seashore of the commonwealth, which has not vested in individuals or corporations under the Colonial ordinance of 1647, or other act of the Government; and the Legislature may grant the title in the soil, or the right to build wharves thereon below as well as above high water mark."
>
> *Nichols* vs. *City of Boston*, 98 Mass. 42.

And the same Judge, speaking lately for this Court, said that the discovery of the English possessions by British subjects vested in the King

> "all vacant lands and the exclusive power to grant them. * * * And upon the American Revolution all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States."
>
> *Shively* vs. *Bowlby*, 152 U. S. 14.

The treaties with England which acknowledged the independence of the United States, gave to the National Government no territory in any State. Although it had for years been in possession of Fort Niagara in New York, it was held by the Supreme Court of that State that the United States had acquired no title thereto.

People vs. *Godfrey*, 17 Johns 230, quoted as authority in *Fort Leavenworth* vs. *Lowe*, 114 U. S. 538.

The new State therefore by her admission upon an equal footing with the original States, became endowed with the same title to all lands—uplands, lowlands, tide-lands—within her limits, not already granted and not specially reserved by the United States, as Massachusetts had at the date of the formation of the Union. If the rocks of the Bay of San Francisco were not specially reserved, they became California's property in 1850. They were not so reserved unless they fall within the description of "public lands" to be disposed of by the United States. The Court will note that there is no *reservation* in the Act of Admission of any lands whatever. The State is admitted upon the condition that she will not *interfere with the primary disposal of the public lands within her limits.* The public lands referred to by the Act are clearly *those public lands which the United States is in the habit of*

disposing of, not every parcel of rock, sand spit or river bar within the State's confines which may not have passed into private ownership prior to the Mexican cession.

It is important, therefore, to determine what the legal effect is of the condition annexed to the State's admission, because, as was held in *Pollard's Lessee* vs. *Hagan,* 3 How. 223 (construing similar words upon the admission of Alabama), when the State was admitted, *"nothing remained in the United "States,* according to the terms of the agreements, but the "public lands."

These words have been so often construed by this Court in cases in which the *very question was* whether the words "public lands" included lands below high-water mark, that further controversy on the subject is impossible.

In *Mann* vs. *Tacoma Co.,* 153 U. S. 273, the question decided was whether the holder of Valentine scrip, which, according to its terms, might be located on *"unoccupied and unappropriated public lands"* could by its aid, take up tide lands in the Territory of Washington.

The Court, after quoting from *Shively* vs. *Bowlby,* 152 U. S. 1, said:

> "It is unnecessary in view of this recent examination of the question, to enter into any discussion respecting the same. It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the Act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, *but the term 'public lands' does not include tide lands.* As said in

Newhall vs. *Sanger*, 92 U. S. 761, 763: *'The words public lands are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.'"* The location was held invalid.

See also

Leavenworth etc. Railroad vs. *United States*, 92 U. S. 733;
Doolan vs. *Carr*, 125 U. S. 618;
Newhall vs. *Sanger*, 92 U. S. 761, 763;
Shively vs. *Bowlby*, 152 U. S. 49;
Morris vs. *U. S.*, 174 U. S. 237.

We ask the Court to note the similarity of language in the construction of the Court, that public lands are those subject to *disposal under general laws*, and the condition of the Act of Admission that California should not interfere with the primary *disposal of the public lands*. The Act must, necessarily, be read to prohibit interference with the disposal of those lands which are subject to sale or other disposal under general laws. Isolated rocks, lying in tide waters, barren of soil and water, and of no value for settlement, with neither agricultural or mineral resources, are not such lands as are held by the government for "disposal under general laws".

> "The United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

Barney vs. *Keokuk*, 94 U. S. 324, 338;
Leavenworth vs. *U. S.*, 92 U. S. 733;
Doolan vs. *Carr*, 125 U. S. 618;
Illinois Central vs. *Illinois*, 146 U. S. 387.

If the foregoing cases establish the rule that no settlement could lawfully be made on Mission Rock under the pre-emp-

tion or homestead Acts, it is clear that the rock is not "public land". In *Morris* vs. *U. S.* (*sup.*) the Court construed the Maryland statutes providing for the disposition of "vacant lands" and held that lands covered by tide water could not have been contemplated

> "because such lands are incapable of ordinary private occupation, cultivation and improvement, and their natural and primary uses are public in their nature for highways of navigation and commerce."

The Court cites as authority *State* vs. *Pacific Guano Co.*, 22 S. Car. 50.

Indeed, the various public land laws of the United States furnish a legislative interpretation of the words "public lands". It is impossible to read the provisions of these Acts without being convinced that none of them is intended to apply to lands under the navigable waters of the State, or that they have application to any lands except those which

> "whether in the interior or on the coast, above high water mark, may be taken up by *actual occupants*, in order to encourage the settlement of the country."
>
> *Shively* vs. *Bowlby*, 152 U. S. 49.

And this rule of interpretation is adopted by the Court in *Morris* vs. *U. S.* (*sup.*) which cites with approval *Alleghany* vs. *Read*, 24 Pa. St. 39, 43. In the last named case a survey was made by the Court of all the statutes governing the disposition of islands in the rivers of the State and upon such survey, it was held that the word "islands" meant such islands as, at the time of application for purchase, *had a soil on them*. Hence an island, once covered with soil, but laid bare by a freshet, so that though entirely exposed in the ordinary stages

of the river, the land was covered when the river was very high, was held not to be an island within the meaning of the statute.

Said the Court:

> "The title of the commonwealth to what remained was not gone, but was no longer grantable under the Act of Assembly for selling islands. The foundation of the island belongs to the commonwealth still, but she holds it as she does the beds of the river and all sandbars, in trust for all her citizens *as a public highway.*"

This case also fairly supports the defendant's contention that the rocks of the navigable waters and of the tidal lands of the Bay of San Francisco are parts of such waters and lands and belong to the State. They are parts of the public highway, necessary for the public convenience in the use of the navigable waters, whether for lighthouse purposes, wharves or docks. If the island in the Alleghany which rose above the ordinary high stage of the river was part of the navigable waters of Pennsylvania, there is no reason why a little cap rising out of the midst of the Bay of San Francisco should not be deemed to be part of that body of water.

The foregoing views, we respectfully submit, are fully sustained by an unbroken chain of authority and justly and correctly sustain the defendant's position that as to all tide lands or submerged lands, the title is in the State; that "Mission Rock" is part of such lands, and that if it be not such, it nevertheless belonged to the State as part of the territorial sovereignty or dominion which vested in it on the admission of the State, because it was no part of the "public lands", with the primary disposal of which the State then agreed not to interfere, and which alone did not vest in the State.

We shall not discuss the question of littoral or riparian right advanced in argument by the Government. It is sufficiently answered, even if we should assume that the cap of "Mission Rock" is still vested in the United States, by the statement of the fact that the title of the submerged lands, at the time of filling in, was beyond question in the defendant as the owner of the State's patent, and that it had the right to fill in its own land, if the United States did not interfere on the ground of any consequent injury to navigation. If the Act was an interference with commerce, the United States should at the time have prevented it, as it could have done. If the filling be such interference now, the United States may by proper proceedings seek the aid of the Courts to force its removal, *but it cannot claim title to the land* upon the ground that the filling in interferes with commerce. If a man builds up a wall on his own land which obscures an ancient light of his neighbor, the latter does not thereby become vested with title to the wrongdoer's land.

IV.

THE ACT OF 1864 DID NOT RELINQUISH ANY CLAIM OF THE UNITED STATES TO TIDAL LANDS OR TO ROCKS IN THE BAY. THE ACT REFERRED TO LANDS ON THE MAINLAND HENCE, THE PRESIDENT'S RESERVATION OF "MISSION ROCK" WAS NUGATORY.

The United States assumes in this action that the land in controversy was conveyed by it to the City of San Francisco, by the Statute of July, 1864, which purported to relinquish and grant its title to a larger area,

> "there being excepted from the relinquishment and grant all sites and other parcels of land which have been

> or now are occupied by the United States for naval, military or other public uses, or *such other sites, or parcels as may hereafter be designated by the President of the United States within one year after the rendition to the General Land Office by the Surveyor-General of an approved plat of the exterior limits of San Francisco as recognized in this section in connection with the lines of the public surveys*" (13 Stat. 334).

The President, by executive order dated January 13, 1899, purported to set apart

> "Mission Island and the small island southeast thereof * * * containing according to the plat fourteen one-hundredths of an acre and one one-hundredth of an acre * * * for naval purposes."

In face of the language of the order, it is hardly worth while to discuss the proposition advanced by counsel for the Government, that the President did, or intended to set aside more than the rocks which he named or a greater area than that which he designated. The order did not specify the filled up lands which are now above tide water, nearly four acres in extent. It must be construed according to its words. Indeed, it is itself an admission by the executive department of the title of the defendant in error to the surrounding lands. The only question is as to the legal effect of the order.

The Statute of 1864 should be read in the light of contemporaneous events. These are fully set out in *San Francisco* vs. *Leroy*, 138 U. S. 665. It there appears, and it is part of the records of the Circuit Court for the Ninth Circuit that in June, 1855, there was pending in the United States District ~~Circuit~~ Court the application of the City of San Francisco for confirmation of its title, as a pueblo, to four square leagues of land on the peninsula. In that month, the Van Ness ordi-

nance was adopted by the Common Council, by which the Mayor was directed to enter in the proper land office "all the lands *above the natural high-water mark of the Bay of San Francisco*" within the corporate limits of the City, which lands the City was to hold "in trust for the several use, bene- "fit and behoof of the occupants or possessors thereof". The ordinance also provides that ratification of its provisions should be sought from the Legislature and application be made to Congress "to relinquish all the right and title of the United "States to the said lands, for the uses and purposes hereinbe- "fore specified".

It is quite clear that this step was taken to protect the inhabitants of the City against a possible adverse decision by the District Court. In 1858 the Legislature ratified the ordinance. In 1864 Congress relinquished its interest in favor of San Francisco to the lands comprised within the charter limits of 1851, as defined in the ordinance, reserving, however, in the words already quoted, the right of excepting from the relinquishment, sites and parcels as might be designated by the President within the time stated in the Act. Before a year had elapsed from the date of the Act of 1864, it became, as to all lands on the peninsula, unless an appeal should be taken, *functus officio* by reason of the decree of the United States Circuit Court of May, 1865, which confirmed to the City, as successor of the Mexican pueblo, four square leagues of land on the peninsula above ordinary high water mark. *The title to the site of San Francisco was thus found to antedate the cession of California.* The Act of 1864, therefore, if the United States had nothing to convey, relinquished nothing to the City of San Francisco, and if it be held that its in-

tention was that it should act upon the lands referred to in the Van Ness ordinance which did not include lands lying below high water-mark, it would seem that the Act of 1864 did not convey "Mission Rock". In 1866, an appeal then being pending before the Supreme Court of the United States from the decree of the Circuit Court, the aid of Congress was sought to prevent that decree from being disturbed. That body passed the Act of March 8, 1866, confirming the decree establishing the pueblo title and relinquishing the claim of the United States to the lands included within it. That Act caused necessarily the dismissal of the appeal. The title of the pueblo under the decree thus became final. It would seem from this recital that, possibly excepting "Mission Rock", the Act of 1864 conveyed nothing to the City. The relinquishment of title by the United States to property decreed to have been, since the date of its organization, in the City by virtue of its right of succession to the Mexican pueblo, added nothing to the already perfect title established by the decree. The only question then, is whether the Van Ness ordinance, which was the basis of the Act of 1864, included lands not lying on the peninsula, such as an uninhabitable rock of insignificant dimensions out in the bay. The express object of the ordinance was to secure to the "*occupants and possessors*" of lands within the corporate limits the benefit of the title to the lands occupied by them. The lands "above high water mark of the Bay of San Francisco", the title to which was sought by application to the United States for the behoof and benefit of such "occupants and possessors", were presumably the same lands for which the City was contending in the Court at this time on behalf of the same persons. The lands claimed for

the pueblo included only lands on the peninsula above high water mark and, therefore, excluded "Mission Rock". It is only reasonable to assume that these were the lands applied for by the ordinance and that these, therefore, did not include the rock. When therefore, the decree of the Circuit Court confirmed to the City the four square leagues owned by the pueblo, excluding therefrom "such lands as have been here-"tofore reserved or dedicated to public uses by the United "States", it estopped the parties to the suit (the United States and San Francisco), from thereafter claiming title to any lands within the pueblo limits, not adjudicated to them by the decree. The power of reservation given to the President by the Act of 1864 was thus declared to have nothing upon which to operate, unless "Mission Rock" should be held to have been granted to the City by that Act, and this rock, as we have seen, was never within the intention or reason of the ordinance, or the statutes of California or the United States, though within the limits of the charter of 1851.

> "A thing which is within the letter of the statute is not within the statute, unless it be within he intenion of the makers."
>
> *1 Bac. Abr.*, 247, quoted and applied in an analogous case;
>
> *Leavenworth* vs. *U. S.*, 92 U. S. 733, 741.

The failure of the Surveyor-General to file a map in the General Land Office "in connection" with the lines "of the public surveys" as recognized in the fifth section of the Act, and the omission of the President for thirty-six years to take any action are, themselves, a construction of the Act by the

executive department to the effect contended for by us, that the lands there referred to were the lands being contended for by the pueblo.

V.

ASSUMING THAT "MISSION ROCK" WAS INCLUDED IN THE MEANING OF THE ACT, THEN THE TITLE PASSED TO THE CITY OF SAN FRANCISCO. IT HAS NOT SINCE BEEN REVESTED IN THE UNITED STATES, SO THAT THE LATTER CAN MAINTAIN EJECTMENT FOR THE ROCK.

If we accept the Government's contention and admit that "Mission Rock" was intended to be covered by the area defined in the Act of Congress from which exceptions might be made under the terms of the Act, there are still insuperable objections to the maintenance of this action. Ejectment cannot possibly lie to recover lands, the title to which has been conveyed by the plaintiff subject to an exception which is undefined in the grant. Upon the Government's theory, in one aspect of its case, *the title to "Mission Rock" has been in the City of San Francisco for thirty-six years.* The exception in the Act of Congress is of such site or sites as, after the filing of a map to be thereafter made, the President might, within a year, select for public purposes. The exception was void for uncertainty. An exception in a deed must be a portion of the thing granted, or described as granted, and which would otherwise pass by the grant.

Brown vs. *Allen*, 43 Me. 590.

The same certainty of description is required in an exception out of a grant as in the grant itself, and where a deed excepts out of a conveyance one acre of land and there is nothing in the exception, or evidence to locate it upon any par-

ticular part of the tract, the exception is void for uncertainty, and the grantee takes the entire tract.

Mooney vs. *Cooledge*, 30 Ark. 640;
Darling vs. *Crowell*, 6 N. H. 421;
Andrews vs. *Todd*, 50 N. H. 565;
Waugh vs. *Richardson*, 30 N. C. 470; s. c. 8 Iredell, 470.

It must be conceded, then, that the exception retained no title in the United States to any part of the land granted. So far as "Mission Rock" is concerned, the title has never revested, nor has the United States ever entered or obtained possession.

In a case in which the exception was of "three-fourths of an acre as a burying ground" the Court held that the evidence showed what the precise land intended to be reserved was, but it said:

> "It is well settled that in such cases the uncertainty may be cured by the election of the grantor, *which, however, must be made in a reasonable time.*"

Benn vs. *Hatcher*, 81 Va. 25.

Where the reservation in the deed was not specific enough to take it out of the words of conveyance, the land could not be recovered *in ejectment.*

Butcher vs. *Creel's Heirs*, 9 Gratt. 201.

The exception in the Act of 1864 is repugnant to the grant, and therefore void.

> "Every saving which crosses the grant is, so far as it is repugnant, of no force; and *it is repugnant wherever the things must necessarily pass in the first instance to satisfy the words.*"

Shoenberger vs. *Lyon*, 7 W. & S. 184.

In *Stambaugh* vs. *Hollabaugh*, 10 S. & R. 357, A conveyed 142 acres to B in fee, "excepting a small quantity struck off "the said tract at the west end by a conditional line". The line was not marked and could not be ascertained. Twenty-three years afterwards, A came upon the land, had twenty-one acres surveyed, pointed them out to his vendee and deeded them. It was held that A's vendee had no title. The Court said:

> "But the reservation of a small quantity is so very uncertain, I doubt whether so vague an exception could be supported. * * * How could a purchaser know what or where he was buying? The land could be locked up from any description of improvement, until it pleased the grantor to strike off what he pleased, or where he pleased. Can it consist with any principle of property, or any certainty or security in conveyances and possession, that at the end of 23 years, the grantor point out with the swing of his whip, where it was to begin, though he confesses it appears a strange wood to him, and then leave it to them and to whom he was about to sell the small quantity, to gut the whole and scoop out the marrow of the land; and can it depend on his nod, how much he is to take, under the denomination of a small quantity. * * * *The title of the whole would pass, for in 23 years the presumption would be that this undefined small quantity has been abandoned to the grantee."*

The curious analogy of this case to the case at bar and the caustic remarks of the Judge are not weakened by recalling the facts that the Act of 1864 is "an Act to *expedite* the set-"tlement of land claims in California * * * ", that the power, as it is claimed, is given to the President to take property worth millions from the inhabitants, or, in his discretion, to take nothing at all, and that by holding back the survey of

the land by his subordinate officer or the filing of the "approved plat" in the general land office, he may postpone the right of selection until such time as a merciful Congress may repeal the law itself and deprive the President of the power of confiscation.

In 1865 the Circuit Court nullified the Act by its "Pueblo" decree, as to all the lands on the peninsula of San Francisco. The exact limits of the rights of the United States were in that decree settled for ever. The Court held then, that the right of San Francisco to the lands on the peninsula antedated the cession by Mexico to the United States. We have already seen that all of the tidal lands passed to the State by the Act of Admission. Goat Island, Angel Island and Alcatraz Island were excluded from the grant by the terms of the Act of 1864—these and other lands having already been reserved to public uses in 1850 by the executive—and the peninsula belonged to the Pueblo before the cession, though the exact limits of the Pueblo had not been determined. There was, therefore, *nothing left in the United States* within the boundaries referred to in the Act which could by the widest construction pass to San Francisco by the Act of 1864 *except Mission Rock* and the smaller rocks which every year or two are being blown out of the water. If "Mission Rock" was, in fact, all that the United States could pass by its deed, the gift, it seems, was an Indian gift. It has been recalled. The exception as now sought to be enforced, covers *the entire estate granted by that Act.* The United States must be held to know the law as much as the private citizen. Hence, when the grant of the Act of 1864 was made, it knew that, at most, it was conveying only "Mission Rock". When it created the

exception which, if lawful, would take away "Mission Rock", it created an exception repugnant to the grant, which exception was, for that reason, void.

The evidence further shows that the map which was to be filed by the Surveyor-General in the land office has not yet been filed. The right of the President to make a selection or reservation is, by the terms of the Act, to vest *upon the filing of the map,* and not before. He had no power to make the reservation when he did so.

In whatever way we view the matter, it certainly seems clear that the exception cannot authorize an action of ejectment, success in which would take from the defendant in error, lawfully in possession of the title of the grantee under the Act, not the lands merely, but vast and costly improvements. Whatever title the State had, the defendant in error has by virtue of a patent; whatever title the city had, the defendant in error has, by virtue of its independent and adverse occupancy for nearly thirty years. If the title be in the city (we claim that it never was), the United States has no right to the rocks.

We have not entered into a discussion of littoral rights or those of accretion. These are clearly inapplicable, whatever the law may be, *first,* because the defendant in error is the undoubted owner of the lands surrounding the rocks upon which its predecessor created the area of land now above tide water, which area is termed "accretions" by the Government's counsel; *second,* because the President has not set apart the "accretions" by his order, but only the land containing fourteen one-hundredths of an acre known as "Mission Island"

and the "small island northeast thereof", which contains one one-hundredth of an acre. Counsel for the United States suggested in the lower Court, as an argument in favor of a presumed intention by the Government not to allow private ownership or State ownership of submerged lands surrounding its islands, that such ownership would be inconsistent with their use for public purposes, and it is suggested that "Alcatraz", as a means of defense, would be rendered useless were it permissible to the State to grant such lands. The answer to this suggestion is best found in the evidence in the case at bar. The United States engineers, with the approval of the War Department, have drawn the line beyond which the defendant in error shall not use *its own land*. At this line, the Government declares that the channels of commerce begin. The ownership of the defendant in error beyond this line can avail it nothing. The National Government is supreme in its power over navigable waters. Hence, though the State should sell every foot of tide and submerged land round "Alcatraz Island", the purchaser would take the title subject, always, to the control of the United States over the waters covering them. *At its will, the original depth and the free navigation of these, may continue forever.*

The defendant in error submits that the judgment should be affirmed.

Respectfully submitted,

Thos. Kay
Ed. J. McCutchen
Samuel Knight
Attorneys for Defendant in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 9 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 198.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

THE MISSION ROCK COMPANY.

Supplemental Memorandum on Matters Stated in Brief for the United States Filed Since Submission.

1. At common law the right of the owner of lands fronting on the shore to wharf out does not exist (*Shively v. Bowlby; Weber v. Harbor Comm'rs, sup.*).

2. *Yates v. Milwaukee* states the law of Wisconsin on the subject of riparian rights on a navigable *stream*. *Weber v. Harbor Commissioners* confines the rule to a stream, as we read the case, and shows that, except where legislation or immemorial usage has changed the rule, the right of wharfing out does *not* vest at common law in the riparian proprietor on the *sea shore*.

3. California adopted the common law at its first session (*Stat.* 1850, p. 219), and at the same session asserted its do-

minion over tide lands in the State by disposing of those fronting on San Francisco (*Stat.* 1850, p. 307).

4. *Pacific Imp. Co. v. Ellert*, 64 F. R., 425, decided by Judge McKenna, reviews the California law on this subject and distinctly holds that the State may sell its submerged lands free of any easement whatever in favor of the riparian proprietor. In the recent case, *Oakland v. Oakland Water Front Co.*, 118 Cal., 160, the supreme court of the State asserts that the doctrine of the Chicago Water Front case has always been the law of California, and (p. 185) distinctly recognizes that the alienation of the tide lands by the State "may pre-"vent access to the navigable waters of the bay." This cannot be helped.

5. In *Pacific Imp. Co. v. Ellert*, page 439 (*sup.*), it is said that *Shirley v. Bishop*, 67 Cal., 543, shows *not* that "the ri-"parian rights of an owner of land bordering on Carquinez "strait were explicitly upheld" (as claimed by the Solicitor General), but that "there was *no question of riparian rights" involved*—a marked difference.

6. Nowhere is it held, as we read the cases, that the riparian proprietor acquires a title to the tide or submerged lands simply because he may at some time in the future desire and has the right to wharf out.

Respectfully submitted.

CHARLES PAGE,
Attorney for Defendant in Error.

23574

Supreme Court of the United States.

No. 198.—October Term, 1902.

The United States, Plaintiff in Error, vs. The Mission Rock Company. } In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 13, 1903.]

Ejectment brought in the Circuit Court of the United States, Ninth Circuit, Northern District of California, by the United States against the California Dry Dock Company. Pending the hearing the latter company sold and transferred its title to the Mission Rock Company, a corporation, which thereupon entered into possession of the property. By stipulation the Mission Rock Company was substituted as defendant, and an amended and supplemental complaint was filed.

The property sued for was described by metes and mounds, and it was alleged constituted a "tract of land, being a square, including the rock known as Mission Rock, and containing 14.69 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian." Damages and rents and profits were also prayed in the sum of $355,000.

By consent the case was tried by the court, and its findings as far as material are as follows:

"II. At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than twenty and less than forty feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause and marked Exhibit 'A.'

"III. The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called 'Mission Rock' had an area of fourteen one-hundredths (14-100) of an acre; the other had an area of one one-hundredth (1-100) of an acre. These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides to the extent that they were covered and uncovered by the flow and ebb of the tide varied from ten to twenty-five feet, depending on their steepness. Both rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half a mile of the then shore line of that part of the bay upon which the city of San

Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland and surrounded and now surrounds them.

"IV. The lands described in the complaint were not, at the date of the admission of the State of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican governments.

"V. No approved plat of the exterior limits of the city of San Francisco as provided by the terms of section 5 of the act of July 1, 1864 (13 Stat. 332), has been filed or rendered to the General Land Office of the United States, or of the State of California. The lands sued for in this action are within such exterior limits.

"VI. On the thirteenth day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

'EXECUTIVE MANSION, *January* 13, 1899.

'It is hereby ordered that the Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

WILLIAM MCKINLEY.'

"VII. On the day of March, 1864, the United States surveyor general for the State of California extended the public survey so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

"VIII. On April 4, 1870, the governor of the State of California approved an act of the legislature of the State entitled 'An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor,' which act was printed in the statutes of California for the years 1870–1871, at page 801, is hereby referred to and made part hereof.

"The lands herein described include the lands sued for in this action.

"On the 11th day of July, 1872, the State of California, in conformity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

"After execution of the said patent the said Tichenor executed and delivered a deed of grant, bargain and sale, dated May 1, 1878, purporting to convey the said lands to the California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named company has not since said date conveyed to any person or corporation the said lands.

"IX. The California Dry Dock Company, upon going into possession of said lands so conveyed, undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about four acres, upon which exten-

sive warehouses were built by it, and wharves erected for the accommodation of shipping.

"Since the issuance of the State patent hereinbefore referred to the patentee thereof up to May 1, 1878, the California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present time, have been in continuous and uninterrupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof."

The conclusion of the court was that the United States was entitled to the lands sued for, without damages or rents and profits, and judgment was entered accordingly.

The Circuit Court of Appeals reversed the judgment, and remanded the cause with instructions "to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California; and as respects the remainder of the land sued for, that the plaintiff take nothing." (109 Fed. Rep. 763.) This writ of error was thereupon sued out.

Mr. Justice McKENNA, after stating the case, delivered the opinion of the Court.

"It will be observed," as was said by the Circuit Court of Appeals, "that the judgment of the Circuit Court was not limited to the two rocks or islands embraced in the executive order of January 13, 1899, the one covering fourteen one-hundredths and the other one one-hundredth of an acre, but awarded the government the entire tract of fourteen and sixty-nine one-hundredths acres, including the warehouses and other improvements constructed by the defendant and its predecessors in interest." The Circuit Court of Appeals confined the recovery of the plaintiff to the rocks proper and awarded the submerged lands to the defendant. The controversy then is, which party has the title to the latter. The defendant in error is the successor of the rights and title of the California Dry Dock Company, that company being grantee of Henry B. Tichenor, who received the patent for the lands on the 11th of July, 1872, from the State of California, in pursuance of and in conformity with an act of the legislature of the State, entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor." (Stat. Cal. 1870–71, p. 801.)

Had the State the title to convey? The plaintiff in error, in effect, contests this, and asserts besides a right to the submerged land as an easement appurtenant to the islands.

The title and dominion which a State acquires to lands under tidewaters by virtue of her sovereignty received elaborate consideration, exposition and illustration in the case of *Shively* v. *Bowlby*, (152 U. S. 1–58.) Prior cases are there collected and quoted, among others, *Weber* v. *Commissioners*, (18 Wall. 65.) From the latter as follows (and the case concerned tide lands in California): "Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California in the Union upon equal footing with the original States absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government." And Mr. Justice Gray said, delivering the opinion of the court in *Shively* v. *Bowlby:* "Each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

This right is an attribute of the sovereignty of the State, and it follows that in the exercise of the right, as said by Mr. Justice Gray, the State may "dispose of its tide lands free from any easement of the upland proprietor." The facts of the case emphasized its doctrine. Shively was the owner of the upland. Bowlby was the grantee of the State of Oregon of the tide lands in front of Shively's property. The grant was sustained. The sovereignty of California and the rights and powers dependent upon it are as complete as those of other States. How has California chosen to exercise them? In other words, what is the law of California as to the title and rights of riparian or littoral proprietors in the soil below high-water mark? Upon the answer to these questions the present litigation must be determined. The title papers of the defendant contain an act of the legislature of the State conveying the lands in controversy in private ownership, and the history of the State shows that the act was in accordance with the policy and practice of the State.

The legislature, commencing at the first session after the admission of the State into the Union, made grants of the tide lands to municipalities under conditions which contemplated their being conveyed to and held in private ownership. Among these was the act of March 26, 1851, known as the "Beach and Water Lot Act." It was entitled "An act to provide

for the disposition of certain property of the State of California." Section 1 provided that "all the lots of land situated within the following boundaries according to the survey of the city of San Francisco and the map or plat of the same now on record in the office of the recorder of the county of San Francisco are known and designated in this act as the S. F Beach and Water Lots; that is to say, beginning at the point," &c. Then follows a description by streets, which includes a portion of the bay. Section 2 grants the use and occupation of the land for ninety-nine years and confirms grants of lands sold by authority of the ayuntamiento, or town or city council, or by any alcalde of said town or city; and section 4 makes the boundary line described in the first section a permanent water front of the city. These acts came up for consideration, and the character of the title conveyed was defined in *Smith* v. *Morse*, (2 Cal. 524;) *Eldridge* v. *Cowell*, (4 Cal. 87;) *Chapin* v. *Bourne*, (8 Cal. 294;) *Hyman* v. *Read*, (13 Cal. 445;) *Holladay* v. *Frisbie*, (15 Cal. 635;) *Wheeler* v. *Miller*, (16 Cal. 125;) *City and County of San Francisco* v. *Straut*, (84 Cal. 124.)

These cases all expressed under varying facts the validity of the title conveyed by the acts of the legislature. They are reviewed in *Pacific Gas Imp. Co.* v. *Ellert*, (64 Fed. Rep. 421.)

In *Taylor* v. *Underhill*, (40 Cal. 473,) Mr. Justice Temple said, speaking of lands below high-water mark: "This State can probably sell the lands, and authorize the purchaser to extend the water front so as to enable him to build upon this land . . ."

The decisions cover a period of many years and have become a rule of property and the foundation of many titles. As said by Circuit Judge Ross, delivering the opinion of the Circuit Court of Appeals: "A large and valuable part of the city of San Francisco, extending from the present water front to, in some places, Montgomery street, was at the time of and subsequent to the admission of California into the Union a part of the submerged lands of the bay, but has since been filled in by the many hundred grantors under the city and State, who have erected buildings and improvements thereon at costs running into many millions of dollars. All of this was done in aid of commerce, in the upbuilding of a great city upon the bay, and with the encouragement and consent of the general government."

There is nothing inconsistent with these views in *Shirley* v. *Bishop*, (67 Cal. 545;) *People* v. *Gold Run Ditch and Mine Co.*, (66 Cal. 151;) or in *Heckman* v. *Swett*, (99 Cal. 303.) In *Shirley* v. *Bishop* there was no question of riparian rights. The defendants attempted, under a franchise from the city of Benicia, to erect a wharf within three feet of the plaintiff's wharf, and parallel to it for sixty feet in the navigable waters of the straits of Carquinez, and beyond the water front, established by an act of

the legislature of the State. The building of the wharf was restrained. The other two cases expressed the general doctrine that the title of the State to the lands covered by navigable waters is held in trust for the public. That doctrine is declared in all of the cases. It has a conspicuous illustration in the *Lake Front Case*, (146 U. S. 463.) The doctrine and its limitations are expressed in *Heckman* v. *Swett*, (99 Cal. 309,) and in *Shively* v. *Bowlby*. The court said in *Heckman* v. *Swett:* "Navigable streams and the shores to ordinary high-water mark are held by the State in trust for the public; but qualified rights therein may be granted, so far as they are not inconsistent with, or are in aid of the principal use, viz., for the purpose of navigation." In other words, the rights granted must be in aid of commerce; and it is recognized, as we have seen, in judicial decisions and established by practical examples that the conveyance by the State of its title to tide lands to be held in private ownership free from any easement of the upland proprietor, is in aid of commerce, and therefore in strict performance of the State's trust. See, in addition to the other cases, *Oakland* v. *Oakland Water Front Co.*, (118 Cal. 160.)

2. A claim was made in the Circuit Court of Appeals by the plaintiff in error under section 5 of the act of Congress of July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California." (13 Stat. 333.) By that section the title of the United States to the lands within the corporate limits of the city of San Francisco was relinquished and granted to the city "for the uses and purposes" specified in a certain ordinance of the city called the Van Ness ordinance, which ordinance had been ratified by the legislature of the State. Answering and disposing of the contention of the plaintiff in error, the Circuit Court of Appeals said: "Those uses and purposes . . . had no relation whatever to the rocks or islands here in controversy, which were and are far outside of the pueblo grant of lands claimed by and confirmed to the city." This is not contested here, but it is urged that "the order of President McKinley may be read, not as a reservation under that act, but as an appropriation of Mission Island and the small island southeast thereof, with the shores, contiguous submerged land, and navigable water appurtenant thereto, permanently for naval purposes." There are two answers to the contention. The order of the President explicitly designates the islands proper, and besides limits the areas appropriated to "fourteen one-hundredths of an acre and one one-hundredth of an acre respectively." At the time the order was made the land in controversy had been reclaimed by the California Dry Dock Company, and upon it were "extensive warehouses," which had been built by that company,

"and wharves erected for the accommodation of shipping." The property was so valuable that the plaintiff in error regarded itself damaged by its withholding in the sum of $250,000, and the rental thereof was alleged to be $5,000 per annum. It is not conceivable that the President, by his order, intended to appropriate so valuable a property without explicit declaration, or to leave the appropriation to result as "appurtenant" to the rocks.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.